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RATIONALE
OF
PROXIMATE CAUSE

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BY
LEON GREEN

GREEN PROX. CAUSE

To the Memory
of
JOHN CHARLES TOWNES
Lawyer, Judge, Dean, Teacher.

*He came nearer the ideal in each than any other man
I have known. He gave more to the profession of
his state than any other man of his day. In the eyes
of two thousand and more Texas Lawyers his life
represents the high-water mark of citizenship.*

PREFACE

IT IS NO doubt generally felt that the whole subject of "proximate causation" is a bogey, the sort of thing found only in children's story books—a sort of child's mind creation. A questioning mind not accustomed to reading reported decisions would find plenty of support in the opinions for such a conclusion. Perhaps the intelligent layman, taking some opinions as a basis, would charge the legal profession as lacking in a sense of humor, at least with possessing a credulity not to be expected in seasoned veterans of the work-a-day world. Whatever may be said, it is undoubtedly the general opinion that the field of legal liability is greatly cluttered by "proximate causation" and that it needs to be cleaned up.

The subject is an open one as well as an important one. It must be faced and solved if the law is to be developed with any show of scientific treatment. A recent well known writer justifies his extended views on the subject as follows:

"Finally there are the unsolved problems involved in the doctrine of remoteness of damage. * * * The true nature of the rule of remoteness of damage is a question on which little guidance is to be obtained from the authorities." Salmond: *Law of Torts* (6th Ed.) p. x. "It must be regarded as one of the unsettled questions of the law, and any attempt to formulate a definite and exhaustive answer to it must necessarily be merely speculative. The question, however, is so fundamental that the attempt must be made." (*Id.* p. 142.)

The courts have built up a wilderness of precedents which is impenetrable to any great depths by any field notes indicated in their opinions. Their calls and courses cannot be followed, their steps cannot be retraced, their corners and monuments relocated. It is the thesis of this book that their bearings have been incorrect. The problem now is to ascertain correct bearings, the location of a definite starting point. From this it may be found possible to work out a basis for translating those thousands of surveys which have been made in this territory so that they aid rather than hinder its development.

The chart offered in this small volume is rather by way of analysis than a report of every detail which may be worthy of observation. It is believed that the larger points to be emphasized and which are essential to an understanding of the process presented would be blurred by a detailed exposition. Only such illustrative material has been employed as has been thought requisite to a clear understanding of the views presented. Since the simplicity of the process is the author's chief point of pride, he has attempted to subordinate everything to simpleness and clarity of statement. He has employed terms in the widest use in order to avoid the disagreement as to meanings of the host of technical words ordinarily employed in treating the subject. His purpose is to emphasize the ideas, leaving it to the individual to translate them into the particular terminology which means most to him. Perhaps it is always desirable in dealing with a difficult subject to strip bare the concepts involved, otherwise mere dress will be taken for substance.

The illustrative material employed is drawn in large part from those striking cases which have been ferreted out and made use of by the eminent scholars who have given the subject attention: Professors Wigmore, Jeremiah Smith, Ames, Beale, Bohlen, Edgerton, Sir John Salmond, Sir Frederick Pollock, and others. There is more material available than can be used in such a book as this. If the process outlined proves acceptable, there will be time enough to carry it to such lengths and perfection as will make articulate those thousands of decisions which the courts are called upon to appraise in passing on difficult problems of "proximate causation."

The author's faith in the analysis presented has been greatly strengthened by the approval given by his friends who have been kind enough to offer many valuable criticisms. Also, by the fact that in attempting to teach the subject in classroom it has been found that students readily grasp the process outlined and are capable of applying it intelligently in the widest range of difficult cases. Finally, in the writer's limited practice he has employed it to discover the vital points in his cases and, having done so, he has been able to present them to the courts with such clarity as generally to make his analysis acceptable. Moreover, in analyzing difficult precedents, it has been found possible to discover the decisive factors involved so that they could be understood, distinguished, or brought to bear with greater force than could otherwise have been employed.

In this connection it must be said, however, that judges are very timid about the use of new terms. They de-

part from orthodox terminology with the greatest uneasiness. The writer in his practice, found it advisable in rare instances when his thoughts could not be conveyed in the simplest nontechnical terms to translate his ideas into the usual orthodox terminology employed by the courts. This can be done by giving such terminology a meaning which corresponds to the ideas sought to be conveyed—largely a matter of emphasis, since those orthodox terms are generally broad and indefinite. This putting of new wine in old bottles may not be commendable generally, but it is an exceedingly practical way of allaying prejudices whenever they are found to exist. It is a mere matter of translating one language into another.

LEON GREEN.

July 1, 1927.

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RATIONALE OF PROXIMATE CAUSE

CHAPTER 1

THE PRIMARY PROBLEMS OF TORT LIABILITY

SECTION 1

GENERALLY

The composition of a case in tort is more complex than has been generally supposed. The assumption by courts and legal writers that a tort is made up only of the elements of wrongdoing, causal connection and damage has led to no end of confusion in the development of this branch of the law. While the causal relation and damage elements are acceptable and usable terms, the so-called "wrongdoing" element is too comprehensive, and tends to obscure the real process to which a supposedly tort case must be subjected before responsibility can be determined. The stubborn unity of a tort case demands a more searching analysis than this term affords, and as desirable

as simplicity may be, it is disastrous to clear thinking and the law's development to crowd too many concepts into an expansible catchword.

In any tort case all of the following inquiries arise. Any one or more of them may present difficult problems. But it is seldom that more than one or two of them give trouble in a particular case.

(1) Is the plaintiff's interest protected by law, i. e., does the plaintiff have a right?

(2) Is the plaintiff's interest protected against the particular hazard encountered? ¹

(a) What rule (principle) of law protects the plaintiff's interest?

(b) Does the hazard encountered fall within the limits of the protection afforded by the rule?

(3) Did the defendant's conduct violate the rule which protects the plaintiff's interest? ²

¹ This inquiry presents several phases, and further subdivisions might well be added as follows:

(c) Does the plaintiff's conduct defeat the protection afforded?

(1) Consent; (2) contributory negligence; (3) assumed risk.

(d) Is the defendant's conduct privileged? (*Patterson v. Jones* [K. B. 1828] 8 B. & C. 578.) But in order not to encumber the analysis with too great detail, consideration of these is omitted.

² The term "wrongdoing" is not objectionable if restricted to this inquiry. It has been too frequently used as including inquiries (1) and (2).

By the term "rule" is meant a generalization. No distinction is drawn between "principle" and "rule." The refinement, if any, is not needed here. A rule may be a broad generalization as in *Heaven v. Pender* (Brett, M. R., 11 Q. B. D. 503 [1883]) or as in *MacPherson v. Buick Motor Co.* (217 N. Y. 382, 111 N. E. 1050, Ann.

(4) Did the defendant's violation of such rule cause the plaintiff's damages?

(5) What are the plaintiff's damages?

Phrased in terms of requisites, a tort comprehends: (1) An interest protected, (2) against the particular hazard encountered, (3) by some rule of law, (4) which the defendant's conduct violated, (5) thereby

Cas. 1916C, 440, L. R. A. 1916F, 696 [1916]) or it may be the most concrete prohibition as "No left turn." Between these extremes there are innumerable gradations. What rule is relied on to protect plaintiff's interest? Is the injury within the range of the rule? Illustration: P is hurt by being run into at a street intersection by D's very large dog which turned to the left in disregard of the rule: No left turn. Does this hazard fall within the scope of protection afforded P by this rule? Suppose P relies on the larger generalization, charging that D was negligent in turning so large a dog loose on the streets? Is P's injury within the range of protection of this broader rule?

The term "hazard" may be translated into loss, injury, peril, risk, risk of loss, etc. Perhaps the constant use later to be made of it will quickly indicate the meaning sought to be conveyed by the term. As an example: A wrongfully breaks B's leg. While convalescing B falls and again breaks the leg. His second fall was at least in part caused by the condition of his leg. Is this a hazard for which A is responsible?

Let it be noted incidentally that defining is largely a mirage. Define a term of one word into a dozen and we are immediately called on for a definition of these other words. The best we can do is to translate our thought into the symbols which are generally understood, terms as will afford a maximum of common understanding. Language may play us strange tricks and not the most uncommon of these are found in this business of defining. This does not mean that attempts to stabilize a common currency of terms are futile; we must simply not expect too much of such attempts.

causing, (6) damages to the plaintiff. These inquiries or requisites are stated in the order of their seeming importance rather than in the order they would be considered procedurally, though the differences are minor ones. They will be considered, as far as possible, separately, and in dealing with each, for the purposes of making it decisive of any particular case, it will be necessary to assume that all the other inquiries would be concluded favorably to the complaining party if they were reached.

It will be observed that the first two of these inquiries are problems for the court, while the last three are primarily for the jury—so-called questions of law as opposed to questions of fact. As will be developed later the apportionment of these problems in some cases to judge and jury is a source of considerable difficulty and accounts for many serious blunders.

It is well enough to state in advance that the first and second inquiries are of prime importance. Broadly speaking, little attention has been given to them and while they are pertinent to every case, they have remained largely inarticulate or else have been confused with the relatively minor fact problems of the quality of the defendant's conduct, causal connection and damages, represented by the last three inquiries. Especially has the latter been done with regard to the problem of causation. Although it is at all times and in all cases a pure question of fact—the simplest element of legal liability—the abortive efforts which have been made to solve the inquiries of prime importance in terms of causal connection cannot be exag-

gerated. The deplorable expenditure and stupendous waste of judicial energy which has been employed in converting this simple problem into an insoluble riddle beggars description. Only by a patient process of eliminative analysis can the rubbish of literally thousands of cases be cleared away.

SECTION 2

IS THE INTEREST PROTECTED

The interests protected by rules of law classified under the general head of Torts are numerous. They include all those rights of personality, rights of property and rights of economic advantage and opportunity which in turn form the basis of further classification under the familiar catchwords of assault, battery, false imprisonment, negligence, trespass, conversion, fraud and deceit, malicious prosecution, slander and libel and interference with advantageous relations in numberless variations. Even this is not a complete classification. Additional claims, wants or desires (which may be termed interests) of individuals or groups have from time to time been recognized by being given protection, and when so recognized became *rights* subject to classification under the headings indicated. This process still continues. The recognition of these interests is one of the most important functions of courts. But in any given case whether an interest shall be given recognition seldom presents itself with boldness. Most frequently the complaining party invokes some well-established rule as affording protection to his injured interest and the court merely extends the rule to cover the

interest involved. Thus the law grows. Most interests to which the law gives protection are well recognized.³ The interests of importance to which the law refuses protection altogether are very few. On the other hand, the fullest degree of protection is rarely, if ever, extended to any interest. Consequently at the foundation of every lawsuit this problem of interests must necessarily arise. It offers no difficulty except in those cases where the claim to recognition is not well settled. In the following cases the solution of this problem was decisive, but most of the opinions give no indication that it was recognized.

In *Drobner v. Peters*,⁴ recovery was sought for injuries negligently inflicted upon a child before birth. The question was whether the interest asserted is protected by law. The court denied recovery on the ground that the defendant owed no duty of care to the unborn child with reference to its bodily welfare. In short, the child had no right to freedom from bodily harm.⁵ The determination of this inquiry disposed of the case. It was unnecessary to inquire whether the defendant was negligent or otherwise a wrongdoer, what the damage was, or whether there was a causal relation between the two.

In *Wilson v. Brown*,⁶ recovery was sought by children against their stepfather for the killing of their mother. It was denied because no recognition of such an interest

³ Cardozo, *The Growth of the Law* (1924) 60.

⁴ 232 N. Y. 220, 133 N. E. 567 (1921).

⁵ Although it was conceded that an unborn child is given protection as to its property interests.

⁶ 154 S. W. 322 (Tex. Civ. App. 1913).

was given at common law and the statute permitting a recovery for injuries resulting from death by wrongful act did not cover such a case inasmuch as the mother, if she had lived, could have had no protection by way of damages against her husband, the defendant, for the bodily harm inflicted upon her. A like result would follow in a suit by a child to recover against a third person for seducing its mother, thereby bringing disgrace upon it and its family name, or a suit by a parent for alienating the affections of his child.⁷ The law gives no protection to such an interest.

In *Stiffler v. Boehm*,⁸ the plaintiff sought to recover damages against the defendant for enticing away and alienating the affections of the plaintiff's fiancé, thereby causing a breach of contract to marry. Recovery was denied. The only basis for such a decision is that no recognition is given the interest the suitor may have in such a relation. No protection is afforded against the risk of another's interference in such matters, whatever the motive may be. This is true even though the third person debauches or seduces the promised wife.⁹

Likewise, a minor child is denied recovery for personal injuries caused by the negligence of a parent.¹⁰ But, un-

⁷ See *Pyle v. Waechter* (Iowa, 1926) 210 N. W. 926.

⁸ 124 Misc. Rep. 55, 206 N. Y. S. 187 (1924).

⁹ *Davis v. Condit*, 124 Minn. 365, 144 N. W. 1089 (1914); see (1925) 10 Corn. Law Quart. 259; (1925) 25 Col. Law Rev. 229; *Homan v. Hall*, 102 Neb. 70, 165 N. W. 881 (1917); *Ableman v. Holman*, 208 N. W. 889 (Wis. 1926).

¹⁰ *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923).

der the interpretation of a statute affecting the status of married women to contract, it has been held that a wife may sue her husband for assault and battery,¹¹ and even for personal injuries caused by his negligence, thus giving recognition to an interest theretofore denied under the common law.¹² Very similar statutes have been construed otherwise.¹³

In a suit for damages because of the failure to deliver a death message preventing the sendee from attending the funeral of a near relative, the important question for determination is whether the plaintiff's interest is recognized and protected by the law of the particular jurisdiction.¹⁴

In *Pasley v. Freeman*,¹⁵ the defendant, intending to deceive the plaintiff, falsely represented to him that certain persons were entitled to credit in the purchase of goods. Relying on the representations, the plaintiff extended the credit but the purchasers were unreliable and unable to pay. The plaintiff sought to hold the defendant for the loss suffered. The court's problem was to determine whether the plaintiff's interest was protected. The

¹¹ *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920).

¹² *Bushnell v. Bushnell*, 131 A. 432 (Conn. 1925); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923); see (1925) 38 Harv. Law Rev. 383.

¹³ *Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111 (1910); *Furstenburg v. Furstenburg* (Md. 1927) 136 A. 534.

¹⁴ *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 62 N. W. 1 (1895); see 1 Street, *Foundations of Legal Liability* (1906) 474.

¹⁵ 3 D. & E. 51 (K. B. 1789).

court so held, and the law of deceit was greatly expanded and enriched.

In *Lumley v. Gye*,¹⁶ the defendant interfered with a contract relation between the plaintiff and Miss Wagner under which the latter was engaged to perform at the plaintiff's theatre. The question was whether there was any protection for an interest of this nature. The court held there was, and protection given this sort of interest has been expanded enormously as a result of the decision.

In *Chasemore v. Richards*,¹⁷ it was held that one landowner had no protection against another who should draw off or intercept subterranean or percolating waters, and this is the orthodox common-law rule. Other courts have extended protection to such an interest.¹⁸

On the other hand, in *Rylands v. Fletcher*,¹⁹ it was held that a landowner may recover against a neighbor who brings upon his land dangerous agencies which may escape and do harm to the adjoining premises. In this case there was a large reservoir of water stored by Rylands which escaped and flooded Fletcher's mines. Protection was extended to the plaintiff's interest irrespective of negligence on the part of the defendant. The rule is not universally accepted.²⁰

¹⁶ 2 El. & Bl. 215 (Q. B. 1853).

¹⁷ 7 H. L. Cas. 349 (1859).

¹⁸ *Meeker v. East Orange*, 77 N. J. Law, 623, 74 A. 379 (1909).

¹⁹ L. R. 3 H. L. 330 (1868).

²⁰ See Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. of Pa. Law Rev. 298, 373, 423.

In *Ashby v. White*,²¹ the plaintiff brought an action for being deprived of his vote. Whether his interest in exercising this privilege of citizenship was to be given the law's protection was the only issue involved, but the judges successfully submerged it with minor considerations. The political complexion of the House of Lords finally gave it the law's recognition.

In an action for damages on account of fraudulent representations whereby the plaintiff has purchased land or goods, some courts restrict the damages to the difference between the market value and the price paid. Other courts allow the difference between the value of the property when purchased and its value if the property had been what it was represented to be. In the one case the plaintiff's interest in a good bargain is refused protection.²² In the other, protection is given.²³

Many of these cases are landmarks in the law of torts. They, and others like them, represent big steps in the growth of the law. The problem was the same in all of them. Its recognition and determination was decisive. Considerations of damage, cause and excuses would have been wholly impertinent until this point was settled.

There are numerous cases like these.²⁴ Under what-

²¹ 2 Ld. Raym. 938 (K. B. 1703).

²² *Smith v. Bolles*, 132 U. S. 125, 10 S. Ct. 39 (1889); *George v. Hesse*, 100 Tex. 44, 93 S. W. 107 (1906).

²³ *Morse v. Hutchins*, 102 Mass. 439 (1869).

²⁴ *Edison v. Edison Co.*, 73 N. J. Eq. 136, 67 A. 392 (1907); *Roberson v. Rochester Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); see *Brandeis and Warren, The Right to Privacy*, 4 Harv. Law Rev. 193; *Humble Oil Co. v. Kishi* (Tex. Com. App. 1925)

ever guise such a problem may present itself in the first instance, its recognition and favorable determination for the plaintiff marks an outpost of the law, one of the limits to which the law has developed. Of course, how a court shall know the solution of such a problem when recognized is an inquiry which involves the highest law-making function. Let it suffice at this point that the problem is an open one in every case and is not soluble by any *a priori* formula.

SECTION 3

THE LIMITS OF PROTECTION

It will be observed that the second inquiry (Is the plaintiff's interest protected against the particular hazard encountered) is but a particularization of the more general inquiry of the preceding section. It presents the same kind of problem except that it is more complex and arises with greater frequency. It is believed to demand more of the judicial function than any other problem involved in the administration of justice. The law never gives complete or absolute protection to any interest. The problem therefore is in any case whether the particular hazard falls within the radius of protection thrown about the interest. It will readily appear that the inquiry is neither single nor simple. First, it is necessary to know what rule or rules of law protect the injured interest. The plaintiff usually determines this by invoking some rule which protects the interest. It may or may not be an ap-

appropriate one. If for any reason the plaintiff should not invoke a rule appropriate for vindicating the injury, his mistake would be a fatal one under most systems of pleading. This phase of the problem would always present itself as a pleading problem if pleading were an exact process. But pleading, when rightly considered, being only a preliminary process by way of introducing a case to the court, it is conceivable that this sort of blunder may not become apparent until after the case had been fully developed. Under liberalized systems of pleading there is slight occasion for denying relief to a party who has merely invoked the wrong remedy or who has mistaken the theory of his action.

But assuming that the most efficacious rule of law for vindicating a particular interest which has been injured by the defendant's conduct has been invoked, or that the court gives the plaintiff the benefit of such rule, the difficulties have only begun. The hazards to which any interest is subjected are so numerous, and the reach of any rule which the plaintiff may invoke in its vindication is so poorly defined, and there are so few external guides to tell a court whether a particular hazard is within the range of the rule invoked, that the problem may well prove bewildering. Nevertheless, the court must determine it in every case, consciously or otherwise. The judicial power cannot function in any other way. It is a problem solely for the judge and the jury has no part to play in its determination. It is at this point that the law-making function of courts is most frequently employed. It is here that the great bulk of what we call law—the aggregate of

legal rules with their limitations—is built up. Just as the courts extend the law in the recognition of interests which have been thought to be worthy of the law's protection, so in defining the limits of that protection they exercise an equally expansive power. And the process is applicable to interests recognized by legislative authority in exactly the same manner. An interest having been recognized as worthy of protection, how much protection shall it be given? Against what risks shall it be protected? What are the limits of the rule invoked? Does the rule afford protection against the hazard which plaintiff's interest has encountered? This is the exact inquiry. The rule, therefore, must be explored, surveyed, bounded, before the inquiry can be answered. Fortunately, or unfortunately, there is no way in a developing society by which this inquiry can be determined in advance of the particular transaction which calls for the application of the rule. The rule is a general principle, without bounds, until judicial determination of particular cases gives it such. Even then, it is never definitely bounded, for in the next case the boundaries may be shifted one way or the other by the fixing of an outlying point at a slightly different location.²⁵ The most thoroughly explored and developed rule is without exact boundary and since conflicts between the multitudes of interests now recognized, as well as those being given recognition from time to time, are constantly arising, the boundaries of the rules which protect such

²⁵ See Holmes, *The Common Law*, p. 127; Bingham, 9 *Col. Law Rev.* 22.

interests are subject to constant readjustment. In making such adjustments, and in the recognition of risks as falling within the bounds of those rules, the courts fashion the law. There are numerous cases in which it is clear that the court did not recognize the problem as being a decisive one, or if recognized, it was not candidly met. The attempts which have been made to translate this problem into terms of causation and damage have not made the solution any easier; on the other hand, they have greatly obscured the problem. An attempt is here made to analyze a large number of what have been thought to be difficult cases in order to indicate the path which it is believed leads to a rational conception of the problem and its solution.

In *Bird v. Jones*,²⁶ the defendant erected seats across a public highway which was enclosed for a boat race. The plaintiff was prevented from passing into the enclosure and along the highway by agents of the defendant. He sought to recover under the theory of false imprisonment. A divided court held that he had no protection under the rule invoked,²⁷ though he might have had under another rule.

In *Derry v. Peek*,²⁸ the plaintiff sought to hold the directors of a certain company liable in damages for fraudulent representations which induced the plaintiff to pur-

²⁶ 7 Q. B. 742 (1845).

²⁷ Under a Texas statute such a partial obstruction of one's right of freedom from interference with his choice of location is so protected. Penal Code 1925, art. 1169.

²⁸ 14 App. Cas. 337 (1889).

chase shares in the company. The defense was that the representations were made in good faith and upon reasonable grounds. The court was called upon to determine whether the rule invoked gave protection against false representations made in good faith. It held not and thereby limited the boundaries of deceit to actual fraud as distinguished from innocent misrepresentation. Other courts have not so defined the boundaries of the rule.²⁹

In *Swift v. Rounds*,³⁰ the defendant bought goods of the plaintiff on credit. Nothing was said by the defendant on the subject of his ability or intention to pay for them. The plaintiff sought to recover on the basis of deceit, alleging that the defendant's application to purchase was a representation that he intended to pay, when in fact he had no such intention, but fraudulently intended to cheat the plaintiff out of the value of such goods. The court's problem here was to determine whether the plaintiff's interest was within the protection of the particular rule of law invoked. The court so held and thereby extended the protection given against such risks by the action for deceit.

In *Fottler v. Moseley*,³¹ the defendant, in order to induce the plaintiff not to sell his stock in a certain company, represented that certain sales being made on the market were bona fide. The plaintiff held his stock and an

²⁹ *Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581 (1908); *French Piano Co. v. Gibbons*, 180 S. W. 1185 (Tex. Civ. App. 1915).

³⁰ 19 R. I. 527, 35 A. 45 (1896).

³¹ 185 Mass. 563, 70 N. E. 1040 (1904).

officer of the company embezzled a large amount of the funds of the corporation and absconded. The plaintiff sought to recover the loss in value of his stock caused by the defalcation of such officer, and the principal question involved was whether this was a risk incurred by the defendant by reason of his conduct. Was the plaintiff's interest protected against such a risk as this? The court held that it was.

In *Work v. Campbell*,³² the plaintiff sought to recover in an action of deceit against the defendant for having made false charges against her husband on account of which the plaintiff separated from her husband and caused him to leave the country. The problem was to determine whether her interest was protected against such a risk, and the court held that it was.

In *Wells v. Cook*,³³ the plaintiff, as agent of his brother, purchased sheep from the defendant who represented them sound and healthy. The plaintiff later purchased all of his brother's sheep including those received from the defendant. Due to the diseased condition of the sheep purchased from the defendant, the entire flock became infected. The plaintiff sought to recover damages of the defendant in an action of deceit. The court denied recovery on the ground that the misrepresentation was not made to the plaintiff. The protection of the rule at the basis of deceit was not extended to cover a hazard of this sort. The court said :³⁴ "It is simply impossible that mu-

³² 164 Cal. 343, 128 P. 943 (1912).

³³ 16 Ohio St. 67 (1865).

³⁴ At 74.

nicipal law should take cognizance of all these consequences. * * * If this limit is to be extended it must be the work of the legislature." The problem was not one of causation for which it has been so often mistaken, but one of defining the boundaries of the rule invoked.³⁵

In *Wetmore v. Mellinger*,³⁶ the plaintiff sued the defendant for having maliciously prosecuted a civil action against the plaintiff. No recovery was allowed. The interest which one has in not being harassed by a civil suit is not protected except there be a special injury to person or property. Under the orthodox rule a defendant runs no risk in such a case save the payment of court costs.³⁷ But some courts extend additional protection to such an interest against this risk.³⁸

The common law of England gave no protection to a woman against oral imputations of unchastity, unless such imputations fell within the narrow categories for which an action for slander would lie generally. In *Cooper v. Seaverns*,³⁹ the Kansas court in such a case chose to ex-

³⁵ For further delineation of the rule, see *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210 (1902); *Hindman v. First Nat'l Bank*, 112 F. 931 (C. C. A. 6th, 1902). The same problem, though involving very different circumstances, is present in *Enfield v. Colburn*, 63 N. H. 218 (1884).

³⁶ 64 Iowa, 741, 18 N. W. 870 (1884).

³⁷ *Pye v. Cardwell*, 110 Tex. 572, 222 S. W. 153 (1920). Inability to recover against witnesses who have given perjured testimony presents a similar situation. *Hocker v. Settis*, 239 Ill. App. 392 (1926); see 24 L. R. A. (N. S.) 265.

³⁸ *Eastin v. Stockton Bank*, 66 Cal. 123, 4 P. 1106 (1884).

³⁹ 81 Kan. 267, 105 P. 509 (1909).

pand the rule so as to protect such interest fully. The Texas court did the same thing by invoking an article of the Penal Code.⁴⁰

In *Schoepflin v. Coffey*,⁴¹ the plaintiff sought to recover damages for both slander and libel. It was held that the words spoken were not actionable per se, that is, the interest of the plaintiff was not protected against such a risk in the absence of further facts, to wit, special damages. In the libel action it appeared that the words spoken by the defendant had been published in a newspaper by parties who heard the words spoken, but that the defendant had nothing to do with such publication. Recovery was denied in this action for lack of "proximate" cause. The real basis for denying recovery is that the rule at the basis of an action for libel affords no protection against the risk of a voluntary repetition of the defamatory statement. Such rule of law does not depend upon causal relation, but is based upon the court's determination of sound policy. The courts have so restricted the operation of the rule as a matter of law. Many factors aside from causal relation entered into its delimitation.

In *Vicars v. Wilcocks*,⁴² the defendant, in order to procure the plaintiff's discharge, wrongfully accused him of having cut certain cordage of his employer. The accusation fell short of charging a crime. Having been discharged, the plaintiff sought to recover against the defendant for his wrongful discharge in an action of slander.

⁴⁰ *Hatcher v. Range*, 98 Tex. 85, 81 S. W. 289 (1904).

⁴¹ 162 N. Y. 12, 56 N. E. 502 (1900).

⁴² 8 East, 1 (K. B. 1806).

The court denied recovery because not a "natural consequence" of the defendant's wrong. This is not sound. Causal connection was both actual and "natural." But the court thought that to give a recovery would expand the action of slander beyond reasonable bounds. The result of the decision is that protection was denied the interest of the plaintiff; the risk is not one within the protection of the rule at the foundation of an action of slander. This decision has stunted the growth of the action for slander and embarrassed the development of legal liability generally.

In *Lynch v. Knight*,⁴³ the wife, joined by her husband, brought suit against the defendant for having uttered such base defamatory remarks about her that her husband put her away. Recovery was denied because the special damage was insufficient; the action of the husband in putting her away was not a reasonable consequence of the slander. No such reasons are sustainable. The court simply refused to extend the protection of the rule of law to cover such a risk. The plaintiff's interest was not thought to be entitled to protection against this sort of risk.⁴⁴

In the widely known "squib case"⁴⁵ the sole doubtful problem was whether a recovery could be based upon the legal concept underlying trespass. Was such an injury protected against by the rule of law invoked by the plaintiff? The majority held that the plaintiff's interest fell

⁴³ 9 H. L. Cas. 577 (1861).

⁴⁴ But see *Davies v. Solomon*, L. R. 7 Q. B. 112 (1871).

⁴⁵ *Scott v. Shepherd*, 2 Wm. Bl. 892 (C. P. 1773).

within the protection of this rule. Blackstone, J., held that another rule—that upon which the action on the case is based—was the appropriate rule. Causal relation so frequently asserted to have been an issue in this case was not an issue; it obtained under either theory.⁴⁶

In *Hollenbeck v. Johnson*,⁴⁷ the defendant's cow had in some way escaped from the owner's enclosure without his fault and strayed into the plaintiff's barn and crushed in the floor which covered a cistern located beneath the floor. Without any fault of his own the plaintiff fell into this hole and sustained the injuries for which he sought recovery. The court held the damages to the plaintiff too "remote" and not "proximately" connected with the trespass of the defendant's cow—a strange conception of causal relation. The plaintiff relied on the rule of law which protects a property owner from injury to his property by trespass of a domestic animal having no known harmful propensities. He invoked the correct rule for his property damage and the court so held, but it could not be made the basis of recovery for his bodily injuries. Damages to this interest were remote only in the sense that the rule of law invoked did not protect it against such a hazard. The interest a person has in his bodily security is not fully protected. Conversely, a person is not absolutely responsible to others for all injuries caused by the activities either of himself or of his animals.

⁴⁶ *Guille v. Swan*, 19 Johns, 381 (N. Y. Sup. Ct. 1822) is the same type of case.

⁴⁷ 79 Hun, 499, 29 N. Y. S. 945 (N. Y. App. Div. 4th Dept. 1894).

In the following cases, while negligence in some of them lay at the foundation of the action, still it was removed as an issue either because a violation of a statute was involved or else because negligence was admitted. It will be observed that where negligence is not an issue there is no great difficulty with the problem. On the other hand, wherever negligence is an issue and must be determined there is likely to be confusion.

In *Gardner v. Cumberland Tel. Co.*,⁴⁸ the defendant negligently delivered a telegram to the plaintiff advising him that his brother was dead. His brother was not dead, and the telegram was to another person of the same name. The plaintiff sought to recover on the ground of negligence for the mental anguish caused him. Recovery was denied on the ground that the plaintiff was not a party to the contract. The rationale of the decision is that such an interest is not fully protected; the risk here involved is not one within the scope of the rule invoked. Here the problem stood out boldly but the court apparently did not see it. It is similar to those cases in which a statute has been violated and the question is whether the statute covers the hazard encountered.⁴⁹

In *Hines v. Morrow*,⁵⁰ the plaintiff predicated negligence upon the failure of the defendant to keep a crossing in proper repair. The duty was statutory and owed to

⁴⁸ 207 Ky. 249, 268 S. W. 1108 (1925).

⁴⁹ See (1926) 4 Tex. Law Rev. 270; *Dickson v. Reuter's Tel. Co.*, 3 C. P. D. 1 (1877).

⁵⁰ 236 S. W. 183 (Tex. Civ. App. 1921); see *Stemmler v. City of Pittsburgh* (Pa. 1926) 135 A. 100.

the plaintiff as a traveller on the public highway. The plaintiff, who had a wooden leg, was assisting the driver of a truck in pulling an automobile out of a mudhole in the highway at a point where it crossed the right of way. He knelt down to tie one end of the rope to the axle of the truck while the owner was tying it to the bogged car. When the plaintiff arose he gave the truck driver the signal to go ahead and started to step from between the two cars. He stepped into an unobserved hole with his wooden leg and, being unable to extricate himself of his own strength and realizing his peril, he caught the back end of the truck, expecting to be pulled out by holding onto the truck. As he did this the slack in the rope became entwined around his sound leg and broke it at the ankle so as to require amputation. The defense was that the consequence could not be foreseen and was therefore not proximate. This was not the issue. The only problem was whether this risk fell within the radius of the rule which the plaintiff relied upon, i. e., the defendant's duty to keep the crossing in proper repair, and which admittedly had been violated by the defendant. A recovery was allowed, but had the issue of negligence itself been a contestable one, the result would probably have been different.

In *Krach v. Heilman*,⁵¹ the plaintiff sought to recover for the death of her husband to whom the defendant had furnished intoxicating liquor contrary to a statute. It appeared that the plaintiff's husband became drunk and unable to take care of himself and that in going home, while

⁵¹ 53 Ind. 517 (1876).

lying down in his wagon, a barrel of salt fell on him causing such injuries as proved fatal to him. The court denied recovery because the intoxication of the deceased was a "remote" cause. The problem here involved was not one of causation, but a proper definition of the scope of the rule relied on by the plaintiff for protection. Was the statute intended to protect her interest against such a risk as this? The court's holding necessarily denied such protection. But other courts have held risks as "remote" as this one to fall within the protection of the statute.⁵² The only problem of any difficulty involved in this whole line of cases is that of defining the scope of the protection afforded by the statute. The question of causal connection is an incidental one and wherever made decisive constitutes a false issue.⁵³

A truck driver, about his master's business, was caught out in a severe storm and, on account of his exposure, pneumonia developed. He sought recovery under the Workmen's Compensation Act. There could be no doubt about the damage and the cause, but recovery was denied. The interest of the plaintiff was not given full protection; the risk is not within the purview of the statute.⁵⁴ In

⁵² *Mead v. Stratton*, 87 N. Y. 493 (1882); *Currier v. McKee*, 99 Me. 364, 59 A. 442 (1904).

⁵³ See *Roach v. Kelly*, 194 Pa. 24, 44 A. 1090 (1899); *Gage v. Harvey*, 66 Ark. 68, 48 S. W. 898 (1898); *Neu v. McKechnie*, 95 N. Y. 632 (1884); *Dennison v. Van Wormer*, 107 Mich. 461, 65 N. W. 274 (1895); *Minot v. Doherty*, 203 Mass. 37, 89 N. E. 188 (1909).

⁵⁴ *Texas Employers' Ins. Ass'n v. Jackson*, 265 S. W. 1027 (Tex. Com. App. 1924); *Landers v. City of Muskegon*, 196 Mich. 750,

Panama Railroad v. Rock,⁵⁵ recovery for injuries resulting in death was denied under the Panama Code, although the language was broad enough to allow recovery.⁵⁶

A railroad company failed to equip a car with automatic couplers as required by the safety appliance act. A brakeman, whose duty it was to stop a string of switched cars, failed to stop them in time to prevent a collision with a crippled car. His leg was crushed, while if the crippled car had been equipped with a coupler as required by law, his leg would not have been caught between the cars. The majority said that "the collision was not the proximate result of the defect; * * * the collision * * * cannot be attributed to a violation of the provisions of the law."⁵⁷ This was a wholly false issue. What the court should have held (and in fact did hold) was that the statute was not designed to protect against such a risk, i. e., a risk of personal injury on account of collision. The point is made clear by considering the cases relied on in the dissenting opinion. These were cases involving injuries which were clearly within the protection of the statute.⁵⁸ The issue of causation had no place in the discussion of

163 N. W. 43 (1917); *Hagrove v. Arnold Const. Co.*, 229 Mich. 678, 202 N. W. 918 (1925).

⁵⁵ 266 U. S. 209, 45 S. Ct. 58 (1924).

⁵⁶ See (1924) 73 U. Pa. Law Rev. 215; (1925) 23 Mich. Law Rev. 398; (1925) 38 Harv. Law Rev. 499.

⁵⁷ *Lang v. New York Central R. R.*, 255 U. S. 455, 461, 41 S. Ct. 381, 384 (1921).

⁵⁸ *Louisville & N. R. R. v. Layton*, 243 U. S. 617, 37 S. Ct. 456 (1917); *Minneapolis & St. L. R. R. v. Gotschall*, 244 U. S. 66, 37 S. Ct. 598 (1917).

this case if the court's interpretation of the statute was correct.⁵⁹

An act requiring vessels carrying live stock to be fitted out with pens of small dimensions to prevent a spread of infectious disease was not complied with by the defendant and during the voyage the plaintiff's sheep were swept overboard by a rough sea. Had the vessel been provided with pens such loss would not have been sustained. The plaintiff relied for recovery on the terms of the act. Kelly, C. B., said: ⁶⁰ "But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on the way to this country; * * * the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable." Pigott, B.: ⁶¹ "Admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate

⁵⁹ *Glassey v. Worcester Ry.*, 185 Mass. 315, 70 N. E. 199 (1904), is soluble by a similar analysis; so is *Smith v. Taylor-Button Co.*, 179 Wis. 232, 190 N. W. 999 (1923).

⁶⁰ *Gorris v. Scott*, L. R. 9 Exch. 125, 129, 130 (1874).

⁶¹ At 130. Acc.: *Bischof v. Illinois Southern Ry.*, 232 Ill. 446, 83 N. E. 948 (1908); *Frontier Steam Laundry v. Connolly*, 72 Neb. 767, 101 N. W. 995 (1904); *Hocking Valley Ry. v. Phillips*, 81 Ohio St. 453, 91 N. E. 118 (1910).

the duty of the carrier for all purposes, but only for one particular purpose."

A statute required railroad companies to construct culverts to care for the drainage of adjacent land. The plaintiff invoked this statute as a basis for liability for the drowning of his child in water accumulated on the right of way. The court denied recovery, saying: "The object of this statute was to prevent the railroad from unnecessarily interfering with the natural drainage of the land on either side of its right of way."⁶² *San Antonio Railway v. Behne*,⁶³ should have been decided on the same ground instead of on the false issue of proximate cause.⁶⁴

In *Franklin v. Houston Electric Co.*,⁶⁵ the plaintiff alleged that the defendant, upon proper signal, negligently failed to stop its street car, as required by ordinance, to take him aboard as a passenger, and that by reason of such car passing by, the driver of an automobile following the car was so blinded by the dust that he could not stop his automobile before striking the plaintiff. The court, in holding that a demurrer was properly sustained to the plaintiff's petition, said:⁶⁶ " * * * The automobile was an intervening cause between the alleged negligent act of the operative of the street car and the injury. The two acts had no causal connection. The most that can be said

⁶² *Dobbins v. Missouri, K. & T. Ry.*, 91 Tex. 60, 65, 41 S. W. 62, 64 (1897).

⁶³ 231 S. W. 354 (Tex. Com. App. 1921).

⁶⁴ See Green, Are Negligence and "Proximate" Cause Determinable by the Same Test (1923) 1 Tex. Law Rev. 423, at 432.

⁶⁵ 286 S. W. 578 (Tex. Civ. App. 1926).

⁶⁶ At 579.

is, that the alleged negligent act of defendant's servant was a remote cause of the accident complained of, one which, by the weight of authority, is held to be too remote to be classed as a proximate cause."

There was no issue of causal connection in this case. That there was a very close causal relation is too clear for doubt. Likewise it was clear that the defendant violated the rule invoked by the plaintiff, i. e., the defendant was negligent. The problem was the same whether the plaintiff relied on the violation of a common law rule or the ordinance pleaded by him. It was whether the rule invoked by the plaintiff afforded protection against this sort of hazard. The court itself so recognized in a later part of the opinion:⁶⁷ "Section 1287, requiring street cars to stop to take on and discharge passengers, was manifestly not intended to prevent injuries such as is complained of in the present case." This was the decisive point.⁶⁸ Its solution depended upon far more subtle factors than causal connection.

In *Maskaliunas v. Chicago & W. I. R. R.*,⁶⁹ the plaintiff, a young boy, sought to recover for injuries received while trying to board a moving train operated by the defendant in the city of Chicago. Negligence was predicated on the defendant's failure to have its right of way fenced as required by a city ordinance. The court having

⁶⁷ At 580.

⁶⁸ *Stephens v. Oklahoma City Ry.*, 28 Okl. 340, 114 P. 611 (1911), is subject to a similar criticism.

⁶⁹ 318 Ill. 142, 149 N. E. 23 (1925). See, also, *Wood and Iverson v. Northwest Lbr. Co.* (Wash. 1926) 244 P. 712.

held that the ordinance was for the protection of infants against such hazards (their own irresponsible trespasses) and the jury having found causal connection between the failure to maintain a fence and plaintiff's injuries, judgment in the plaintiff's favor was affirmed. Again, the decisive question was the scope of protection afforded by the rule violated by the defendant.

The same process is inevitable in suits based upon the rules of the common law. The fact that the rule is statutory or of common law origin can make no difference.

A plaintiff was hurt by reason of a defective wheel of an automobile in which he was riding. He purchased the car from a retail dealer, but he sued the manufacturer with whom he had no contract relation and alleged its negligence in failing to inspect the car properly. The question was whether the plaintiff's right to be free from bodily harm was within the protection of the rule of law here invoked, i. e., the duty on the part of the manufacturer to inspect. It was decided in favor of the plaintiff.⁷⁰ The whole line of cases involving the liability of a manufacturer to third persons presents the same problem.⁷¹

A similar question arises in carrier cases in which, owing to the delay of the carrier, a shipment of goods is overtaken and destroyed by unusual natural phenomena, such as a cyclone, earthquake, lightning or unprecedented flood—ordinarily denominated "acts of God." Here the

⁷⁰ *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916).

⁷¹ See, also, *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275 (1922).

defendant is a wrongdoer, damages have resulted, and the delay has at least contributed something to the damage. But is the risk of encountering such phenomena one within the scope of the rule of law which makes delay a wrong? Prompt shipment is required to protect against the risks incurred by not unusual weather conditions, deterioration, market fluctuations and the like, but not against all risks and especially those which in the affairs of men are so unusual that they are ordinarily not guarded against at all and which are not thought of as sufficiently serious to take into account. Hence, the carrier is not required to fashion his conduct as to these unusual risks. The law affords the shipper no protection against them. The rule invoked is not designed to protect against a Galveston storm,⁷² while it might be held to afford protection against floods in the Mississippi Valley where even "unusual" floods are of more or less frequent occurrence. Different courts might well differ on the same facts. In fact, there is a tendency in some jurisdictions to extend protection against some of these risks,⁷³ while in other jurisdictions protection is denied.⁷⁴

D shot P's dog.⁷⁵ The dog rushed into the house and

⁷² *International & G. N. Ry. v. Bergman*, 64 S. W. 999 (Tex. Civ. App. 1901).

⁷³ *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry.*, 130 Iowa, 123, 106 N. W. 498 (1906); *Fox v. Boston & M. Ry.*, 148 Mass. 220, 19 N. E. 222 (1889); *Bibb Broom Corn Co. v. Atchison, T. & S. F. Ry.*, 94 Minn. 269, 102 N. W. 709 (1905).

⁷⁴ *Rodgers v. Mo. Pac. Ry.*, 75 Kan. 222, 88 P. 885 (1907); *Denny v. New York Cent. Ry.*, 13 Gray (Mass.) 481 (1859).

⁷⁵ *Isham v. Dow's Estate*, 70 Vt. 588, 41 A. 585 (1898).

upset P, causing her physical injuries. P sued D for injuries to her person. P relied upon the rule that D was an intentional wrongdoer, and was therefore responsible for all injuries resulting from his conduct. D was an intentional wrongdoer as to the property interest and was responsible for all damages that his conduct caused the dog. But could P rely upon such a rule to support recovery for the injuries done her person? The Vermont court erroneously so decided. The rule of law invoked that a person shall not commit a trespass upon the property of another is not designed to protect against personal injuries unless such trespass is reasonably to be considered a trespass to the plaintiff's person.⁷⁶ Hence, if P is to recover in the case supposed, she should invoke another rule, viz., that a person shall act with reasonable care if under all the circumstances his conduct is reasonably calculated to cause injury to another.⁷⁷ Should D have reasonably foreseen as not unlikely that by shooting P's dog he would cause P physical injury? If so, then since such injury has actually been occasioned by his conduct, D must be held accountable. P really has two causes of action against D. They are based upon injury to different interests, and a different rule of law must be relied upon for recovery in each case. This being recognized, nothing remains to make them more difficult than any other ordinary tort case.

⁷⁶ *Lambrecht v. Schreyer*, 129 Minn. 271, 152 N. W. 645 (1915); *Clark v. Downing*, 55 Vt. 259 (1882).

⁷⁷ *Heaven v. Pender*, L. R. 11 Q. B. D. 503 (1883); *McPherson v. Buick Motor Co.*, *supra*, note 70.

A similar case is presented in *Bigham v. T. & P. Railway*.⁷⁸ There the defendant failed to place a proper latch on its pen for loading cattle. A passing train caused the cattle to stampede. They rushed through the gate and over P who was attempting to fasten it. He suffered both a property loss and injuries to his person. He sought recovery for both. Clearly the duty to provide the gate with a latch was for the protection of P's property interest. The court had no difficulty with that phase of the case. But the court had great difficulty with the suit for personal injuries. It ought to have been readily seen that the rule of law invoked by P to vindicate his property interest was not designed to protect P's person. Had the court recognized this preliminary problem, it would have never reached the issue of causation. As a matter of fact, the issue of causation was as clear in this branch of the case as in the other branch. But the plaintiff was properly denied recovery for his personal injuries because his bodily security was not an interest which the rule of law invoked was designed to protect.

In *Bosch v. Burlington & Missouri R. Railway*,⁷⁹ the plaintiff sought to recover against the defendant for entering upon and occupying with buildings, tracks and cars certain streets between the plaintiff's property and the river, on account of which obstructions the fire department was unable to reach the water in the river so as to prevent destruction of the plaintiff's buildings by a fire which had

⁷⁸ 90 Tex. 223, 38 S. W. 162 (1896). Cf. *Eckert v. Long Island Railway*, 43 N. Y. 502 (1870).

⁷⁹ 44 Iowa, 402 (1876).

originated in an adjoining block. The court held that the defendant's wrongful acts were "too remote to be made the basis of recovery." The plaintiff's interest or right in the street was admittedly prejudiced by the defendant and the plaintiff could have recovered for this wrong. But the protection afforded the plaintiff to this right was not designed to give him the further protection against the hazard of fire. Expressed differently, taking possession of and obstructing the streets, while a wrong toward the plaintiff, did not subject the defendant to the risk of becoming liable for a fire hazard, at least for such originating on other premises. The issue was not one of causation but whether the rule of law invoked by the plaintiff was designed to protect against the hazard in question. Under some conditions, it might well be held that such a risk is within the range of the rule protecting a person's right in an unobstructed street adjacent to his premises. But such a question is one of policy to be determined upon the consideration of many factors. Clearly it is not one of causation.

In *Central of Georgia Railway v. Price*,⁸⁰ the plaintiff was carried beyond her destination due to the negligence of the defendant's conductor. The latter made provision for her to spend the night at a hotel and to return on the morning train at the expense of the defendant. During the night a lamp which the plaintiff left burning in her room exploded and caused her physical injuries for which she sought to recover. The court denied recovery on the

⁸⁰ 106 Ga. 176, 32 S. E. 77 (1898).

ground that the wrong of the defendant was not the proximate cause of her injury but the injury was caused by an intervening negligent hotel keeper. The decisive question was not one of causation, for having to remain in the hotel as a result of the defendant's negligence *was* a factor producing her injury. The plaintiff's right or interest was to be carried to the point of her destination without hurt by the defendant. But this interest is not given absolute protection. Neither the scope of protection given the plaintiff nor the extent of the defendant's liability covered everything which could conceivably cause the plaintiff harm. The court's duty in this case was to define the scope of the protection given to the plaintiff, the extent of the risk on the defendant under its undertaking. The only manner in which a cause issue could have become pertinent was by considering whether the defendant's negligence, as a factor in comparison with the other operative factors, really contributed appreciably to the injury. While this might have become an issue, still so long as the more important problem of determining the scope of the protection to which the plaintiff was entitled was unsolved, the cause element was immaterial.

In *Clark v. Gay*,⁸¹ the defendant pursued a servant of the plaintiff into his house and killed the servant in the presence of the plaintiff's family. The family refused to occupy the house further. The plaintiff sought to recover from the defendant the value of his house. There is no question of cause here. Whether rational or not, the re-

⁸¹ 112 Ga. 777, 38 S. E. 81 (1901).

sult was that for household purposes the house was no longer of value to the plaintiff. The question was whether this interest of the plaintiff in his property was protected by the rule invoked. Was this a risk incurred by the defendant's commission of the murder? The court, in denying recovery, held not. The rule invoked by the plaintiff was lacking in reach.

In *Elliott v. Allegheny County Light Co.*,⁸² a ladder on which the plaintiff was standing while painting slipped and caused him to fall. He clutched an electric light wire attached to the side of the building and, due to lack of proper insulation of the wire, was shocked and burned. He was denied recovery on the ground that the proximate cause of his injuries was his fall and not the uninsulated wire. This conclusion blinks the facts. The wire was clearly a substantial cause factor. The only question was whether the plaintiff's interest in his bodily security was protected by the rule which required the defendant to use care in maintaining its wire in good condition. Should the defendant in maintaining its wire be put under the risk of liability to one in the plaintiff's position? The conclusion of the court is questionable. If the real issue had been considered, the result might well have been different.

In *Ryan v. New York Central Railway*,⁸³ a railroad by its negligence set fire to its own property. From this the fire ignited and destroyed Ryan's house situated on an ad-

⁸² 204 Pa. 568, 54 A. 278 (1903); see *Hope v. Edison Light Co.*, 284 Pa. 112, 130 A. 309 (1925) for a similar case.

⁸³ 35 N. Y. 209 (1866). Also see *Moore v. Van Buren and N. Y. Bill Posting Co.*, 240 N. Y. 673, 148 N. E. 753 (1925).

jacent lot. The court thought that the damage was remote, i. e., the causation was too dim. The rule is admittedly arbitrary,⁸⁴ and to make such a problem one of causation is to cast aside common intelligence. The only meaning of the decision is that adjacent property interests are not fully protected by the rule of law requiring reasonable care in handling fire. Protection is afforded only to the owner whose property is fired first hand by the defendant's wrongful conduct. The court said as much in substance, but its opinion is subject to several interpretations. The rule is not followed generally.⁸⁵

In *Connecticut Mutual Life Insurance Co. v. New York, N. H. & H. Railway*,⁸⁶ the plaintiff sought to recover from the defendant the amount of a policy which the plaintiff had paid to the beneficiary on account of the negligent killing of the insured. The court refused to give protection to the insurance company's interest in the life of its policy holder and denied a recovery. The court indicated that the loss was a "remote and indirect" consequence of the misconduct of the defendant and the case has been considered as an instance of remote causation. This was erroneous. The element of causation was present, but the common law, as in many cases, does not recognize such an interest as deserving of protection against this sort of hazard, nor does the statute permitting a re-

⁸⁴ *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N. Y. 47, 120 N. E. 86 (1918).

⁸⁵ *Milwaukee & St. Paul Ry. v. Kellogg*, 94 U. S. 469 (1876).

⁸⁶ 25 Conn. 265 (1856).

covery for death by wrongful act extend protection to it.⁸⁷

In suits for injuries resulting from fright or nervous shock in the absence of physical impact, some courts refuse recovery altogether, while if there is the slightest physical impact recovery will be allowed.⁸⁸ So long as this is done on the basis that the interest or right of a person to be free from bodily harm caused by the failure to use care on the part of a defendant is not given full protection, but protection is only accorded in certain cases, i. e., when the interest is injured in a certain manner, the decisions are intelligible. But when recovery is denied in such cases on the ground that the element of causation is lacking or is remote, such decisions can only be attributed to a failure to understand the true character of the cause problem.⁸⁹ The doctrine denying recovery in such cases is really based on a so-called public policy, a balancing of interests, with the conclusion that it is better to deny protection to the interest involved under such circumstances than it is to undertake to give compensation under all the difficulties of the case.⁹⁰

In *Wineberg v. Dubois Borough*,⁹¹ the plaintiff's knee

⁸⁷ *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754 (1877).

⁸⁸ *Spade v. Lynn & Boston Ry.*, 168 Mass. 285, 47 N. E. 88 (1897).

⁸⁹ *Bucknam v. Great Northern Ry.*, 76 Minn. 373, 79 N. W. 98 (1899).

⁹⁰ See, generally, Throckmorton, *Damages for Fright* (1921) 34 *Harv. Law Rev.* 260; Wilson, *The New York Rule as to Nervous Shock* (1926) 11 *Corn. Law Quart.* 512.

⁹¹ 209 Pa. 430, 58 A. 807 (1904).

was injured by reason of her falling from a board walk negligently maintained along a public street. Before she fully recovered she suffered further injuries by reason of a second fall which she was unable to prevent on account of her leg being stiff. The trial court's charge permitted her to recover for the second injuries if the jury found they were proximately caused by the negligence of the defendant in causing the first fall. The appellate court held there was no relation of cause and effect between the two falls and denied recovery for the second injuries. Whatever may be the decisive issue here as the case is presented, it is not a lack of causal connection. It would seem that the only problem is whether the protection afforded by law to the plaintiff against the negligence of the town in maintaining its sidewalk extends to subsequent injuries even though they be a result of the injuries first received. The scope of the protection given by any rule must have a boundary; the risk under which a defendant is placed must have a limit. This problem, however phrased, is one of weighing of interests. Should not the court have faced it squarely and declared as a practical matter that in such a case as this the limit of responsibility, irrespective of cause, is the damage done in the primary instance?⁹²

In *Scheffer v. Railway*,⁹³ the plaintiff alleged that as a result of a wreck caused by the negligent collision of the

⁹² See *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 P. 423 (1908); *Wagner v. Mittendorf*, 232 N. Y. 481, 134 N. E. 539 (1922).

⁹³ 105 U. S. 249 (1881).

defendant's trains, Scheffer, deceased, was so injured in body and mind that he took his own life. The court sustained a demurrer to the declaration, holding the defendant's negligence too remote. Surely causal connection was not wanting in the allegations. Had imbecility or tuberculosis resulted from the injuries received, the court would not have reached such a conclusion. If the deceased, while in a delirium as a result of his injuries, had torn off his bandages and infected his wounds so that blood poisoning had set in, no such conclusion would have been reached.⁹⁴ The meaning of the decision is merely that this character of result is not within the protection of the rule of law relied on by the plaintiff. Suicide as a result of a deranged mental condition is not a risk which a defendant incurs by negligently hurting another. The question is not one of causal connection, but one of fixing the boundaries of a legal rule, and it is doubtful that such are correctly marked out in this instance.⁹⁵ There is no such holding under the Workmen's Compensation Act.⁹⁶

In *Clark v. Wallace*,⁹⁷ the plaintiff's employee in charge of certain sheep and unharvested feed was called away to assist a neighbor—the defendant. While away, fire started by the employee's wife got beyond control and con-

⁹⁴ *Daniels v. New York, N. H. & H. Ry.*, 183 Mass. 393, 67 N. E. 424 (1903).

⁹⁵ See *Salsedo v. Palmer*, 278 F. 92 (C. C. A. 2d, 1921); *Waas v. Ashland Day & Night Bank*, 201 Ky. 469, 257 S. W. 29, 35 A. L. R. 1441; (1922) 1 Tex. Law Rev. 114.

⁹⁶ *Malone v. Cayzer, Irvine & Co.*, 45 Scot. Law Rev. 351 (1908).

⁹⁷ 51 Colo. 437, 118 P. 973 (1911).

sumed the feed in the field. The plaintiff sought to recover damages on account of its loss. Recovery was denied on the ground that the absence of the employee was not a proximate cause of the loss. This was at least a doubtful issue. The controlling issue, however, was whether the invasion of the plaintiff's interest by calling away his employee devolved such a risk upon the defendant. Did such hazard fall within the scope of the rule which prohibited the defendant from interfering with the duties of plaintiff's workman? A consideration of this issue would no doubt have made it more difficult to decide that the defendant was under no duty. And, having decided it affirmatively, the issue of causation would probably have been decided differently.

SECTION 4

SUMMARY

So far the attempt has been merely to clear the way for a serious attack upon the principal redoubts of "proximate cause" which are to be found in negligence cases. But even at this stage it should be clear that it is in connection with the problem of defining the scope of protection given to any interest that the courts are prone to seek relief in that vague conception of "legal cause" or "proximate cause" as opposed to causal relation as we speak of it generally. Moreover, if there is any warrant for this elusive phrase it is in this connection. It must be clear, also, that for the purposes required, such conception is entirely too restrictive unless given a weighted

meaning incomparably broader and deeper than the words themselves ordinarily signify. But if given such weighted meaning, it then is something entirely different from cause in the sense of "cause and effect" which is also an element of legal liability. Either we must recognize at least two kinds of "cause" meaning entirely different things, as has already been developed by the courts, or else we must find some way in which to relieve the term of this weighted meaning. It is thought that the analysis here suggested does this and thereby makes clear the problems which are involved so that they can be dealt with rationally. Such an analysis does not solve the problems. It does have the advantage, however, of indicating what they are, drawing attention to the factors involved, leaving to the judge at least the opportunity to appreciate the high function his judicial power must perform.

In extreme cases the process is readily observable. When a statute is invoked, for example, the court must first inquire whether the statute covers this kind of case. Was the statute designed to give protection against this sort of hazard? The court will ordinarily consider innumerable factors in reaching a conclusion on this kind of problem, but if it decides the statute does not cover the case, the litigation is ended. While if the decision is otherwise on this point, then the court faces the further problems of determining whether the defendant violated the statute, and what items of loss the plaintiff was caused by such infraction.

Likewise, when the court is faced with a case based on a common-law rule it is believed the same process is in

volved. Is there any reason for thinking that it is not? The difficulties may be very much greater, however. Assuming that the court in such a case accurately perceives the interest which has been injured, and the hazard which has befallen such interest has been ascertained, it is still very probable that, except in the clearest cases, the rule relied on will not stand out with such boldness and certainty as a statutory rule. But this difficulty does not do away with the necessity either for invoking a proper rule in vindication of the injury incurred or for determining the range of such rule. This is as important in the administration of justice as that the interest itself be a protected one. It is no more possible to vindicate an injury to an interest caused by deceit by invoking a rule prohibiting battery than it is to vindicate the public's interest against murder by relying on a breach of contract. The court, therefore, cannot escape the necessity of outlining or defining in every case the rule relied on so that it may appear clearly enough for the court both to determine its appropriateness and to measure its bounds. Otherwise the court's judgment as to whether the particular hazard falls within the reach of the rule will have the same haziness as the conception of the rule itself. All of these are steps necessary to be taken preliminary to the court's decision as to whether the rule covers such a case. Only after it has so answered does it become necessary to go further and determine whether the defendant violated such a rule, and if so, what the items of loss are which the violation caused the plaintiff to suffer.

Rules vary from the most general to the most specific, and no doubt the most difficult step in the process preliminary to making a decision on a problem of this nature is the definite articulation of the rule relied on in a particular case.⁹⁸ In most instances, perhaps, this is done without consciously taking the step, for most cases are of a normal or standardized type, requiring no conscious consideration. But in the unusual or off-type case the problem cannot be so handled. There, no tracks have been made for the judge to follow, and the precision with which he deals with the problem is decisive. If he fails to recognize it, ignores it, blurs it, or shifts it under any guise to the jury, we may expect irrational results. Ordinarily the problem is dealt with so as to reach satisfactory results except in negligence cases. There, due to the many complexities which arise from other problems, as later to be

⁹⁸ Professor Bingham makes a very similar approach to the problem by requiring the court to define the scope of the duty of a defendant. He suggests that duties are always concrete while a rule or principle of law is an abstraction, a generalization drawn from a number of decided cases and that it can never be defined except in terms of concrete duty. The difference is not thought to be a material one. We constantly employ both terms and for a particular case it is perhaps no more difficult to define the rule than to define the duty. The process is the same. In one, it is to determine whether the hazard created by defendant's conduct falls within the scope or range of the rule invoked; in the other, to determine whether the conduct of defendant falls within the scope of his legal duty which is claimed to have been violated. Much, if not all, that is contended for by Professor Bingham, save the terminology, gives support to our suggestion. See his very incisive and rational discussion in 9 Col. Law Rev. 16-23.

developed, little understanding of the vital part which should be played by this factor in the determination of legal liability has been indicated in the opinions of the courts.

CHAPTER 2

THE SAME PROBLEMS IN CONTRACT ¹

Assuming the existence of a contract, when suit is brought for its breach the inquiries which are pertinent correspond very closely with what may be termed the primary problems in tort liability. First, is the interest asserted by the plaintiff protected under the terms of the agreement? Second, does the particular hazard alleged by plaintiff as constituting the breach fall within the radius of the agreement? These having been answered favorably to plaintiff, the further questions as to what defendant's conduct actually was, the issue of causation, if any, and the issue of damages, would follow as in any other case.

The important inquiry, as in tort, thus becomes a particularization of the first: Is the interest protected under the agreement? Is it protected against the particular hazard alleged by plaintiff? Both are questions for the court as in tort cases. There is nothing to be gained by considering them separately. They involve the same process, but it is somewhat different from that in tort. Instead of surveying the boundaries of a statute or a rule of the common law invoked by the plaintiff the court is called upon to explore the agreement of the parties by which they have

¹ This and the following chapter dealing with the same problems in Crime are inserted for the purpose of contrasting the suggested analysis in the several fields in order to indicate its application to legal liability generally.

circumscribed their respective interests and risks. What does the contract cover? What are its limits? The parties may have already determined this by acting upon it—their practical construction of its meaning. It may be a pattern type, one which has been given a definite meaning by long usage and by the decisions of the courts. A great many contract transactions have become standardized. It is only when some new type of agreement or some extension of a standardized type of agreement is presented that the court becomes aware of its being called upon to find out what interests of the plaintiff were sought to be protected by such agreement, and what risks the defendant incurred thereunder. This gives rise to the familiar problem of interpretation or construction to determine the so-called intention of the parties. Having an agreement, clear in its terms, the court is required to say whether the loss plaintiff has incurred falls within its protection.

Plaintiff held a fire and marine insurance policy issued by defendant covering a boat. Fire broke out in a railroad company's freight yard and caused explosives loaded in cars in the yard to explode. This explosion caused another fire which in turn caused another and much greater explosion. The last explosion produced a concussion of the air which damaged plaintiff's vessel located about 1,000 feet distant. The question is whether the loss is covered by the policy. The court, speaking through Cardozo, J., said:²

² Bird v. St. Paul Fire & Marine Insurance Co., 224 N. Y. 47, 120 N. E. 86 (1918).

"The problem before us is not one of philosophy. * * * General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. * * * The inquiry for us is how far the parties to this contract intended us to go.

"The question is not what men ought to think of as a cause. The question is what they do think of as a cause. We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away. Some glassware in his pantry is thrown down and broken. It would probably never occur to him that, within the meaning of his policy of insurance he had suffered loss by fire. * * *

"The damage was not a loss by fire within the meaning of the policy."

The court was correct in laying down the test for determining the meaning of the policy. But it misconceived the problem before it as involving causation. The problem was whether such a risk was covered by the contract. The last sentence quoted decides that question. All that the court said in its very interesting discussion of causation has little bearing on the decision. One of the factors causing the loss was plain; it was fire. But such a risk as this, even though produced by fire, did not fall within the terms of the policy. Plaintiff's interest was not protected by the contract against *all* the consequences of fire. Both the plaintiff's interests and the defendant's risks

were circumscribed by what the parties intended. Their intention in turn was properly measured by the radius the ordinary business man would give their words, taking into account all the factors bearing upon their situation, or more accurately perhaps, by what the law, based on the common understanding of men engaged in such transactions, says the parties intended.³ The court's problem in this case was far more fundamental than causation and it should not have been confused with one of such minor importance.⁴

An insured punctured a pimple on his lip. The infection spread and death resulted. Insured held a policy of insurance issued by the defendant covering "loss or disability resulting directly, independently, and exclusively of all other causes, from bodily injuries effected solely through accidental means." The question is whether injuries resulting in insured's death were effected by acci-

³ See *Hyer v. Inter-Insurance Exchange* (Cal. 1926) 246 P. 1055, for very interesting case involving the problem under discussion.

⁴ This was also the problem in *Lynn Gas & Electric Co. v. Meriden Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540; *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478; *Louisiana Mutual Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65; *Glens Falls Ins. Co. v. Stewart*, 216 N. Y. S. 149; *Van Vetchen v. American Eagle Fire Ins. Co.*, 239 N. Y. 305, 146 N. E. 432, 38 A. L. R. 1115; *Burt v. Union Cent. Life Ins. Co.* (1900) 105 F. 419, affirmed (1902) 187 U. S. 362, 23 S. Ct. 139, 47 L. Ed. 219; *Feehrer v. Fidelity Casualty Co.* (1914) 188 Ill. App. 398; *Pacific Union Club v. Commercial Union Assur. Co.* (1910) 12 Cal. App. 503, 107 P. 728.

dental means within the meaning of the policy.⁵ There was an incidental question of causation involved, i. e. whether the puncture caused the infection. This gave as little trouble as the usual true problem of its kind. It was treated no differently than in a tort case though incidental to a contract. But the primary question was whether this was such a risk as fell within the terms of the policy. Was it an accident? The court said, speaking through Cardozo, J.:

"But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. * * * Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by the courts."

Here again the court is defining the limits of the parties' agreement; the same problem before it in the preceding case.

Plaintiff sued to recover damages for the loss of a ship chartered to defendant. Defendant in removing a quantity of benzine in cases negligently allowed a heavy plank to fall into the hold of the ship where the benzine was stored. It was found that the plank came in contact with some substance causing a spark which set off the benzine

⁵ *Lewis v. Ocean Accident & Guarantee Corp.*, 224 N. Y. 18, 120 N. E. 56 (1918). But see *Feder v. Iowa State Traveling Men's Ass'n* (1899) 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 *Am. St. Rep.* 212.

vapors, causing an explosion and fire which destroyed the ship. Assuming that defendant was negligent, it was clear that such negligence actually contributed to the loss. It was equally clear that the interest was a protected one. Was it protected against this sort of hazard? A clause of the contract excepted defendant from liability caused by fire. Hence, it was necessary to determine whether fire due to negligence was eliminated as one of defendant's risks by this excepting clause. The court recognized this as a preliminary problem and determined that this clause did not exceed the fire risk in question.⁶

So it must be determined in every case that the injured interest of the plaintiff was within the protection of the agreement, or the statute, or the rule of common law, as the case may be, as against the particular hazard encountered, and, if not, the plaintiff's loss is wholly immaterial. Just as in tort cases, the methods used by the courts in making this preliminary determination are not always clear. If the meaning of the words of the agreement is reasonably certain, the courts usually declare whether the interest asserted by the plaintiff is within its terms. If not so clear, or if there are perhaps other factors outside the agreement which bear upon it, they make use of a jury by means of the "contemplation of the parties" formula.⁷ This formula has generally been considered as a formula for the determination of the damages recoverable. It is so only incidentally. Primarily its function is to deter-

⁶ *Polemis v. Furness Withy Co.* (1921) C. A. 3 K. B. 560, 90 L. J. K. B. 135. This case is considered more fully later, § 118.

⁷ *Hadley v. Baxendale*, 9 Exch. 341 (1854).

mine whether plaintiff's interest is covered by the contract ; whether the loss incurred was one of the defendant's risks under his agreement. Necessarily, an interest not so protected will be excluded from consideration and in this way plaintiff's recovery will be limited. Only after it has been found that a plaintiff's interest is covered by the contract and protected against the hazard encountered, does it become necessary to calculate the damages which have resulted from the breach. The rules for measuring damages have nothing in common with the "contemplation of the parties" formula.

In *Hadley v. Baxendale*⁸ plaintiff sought to recover damages on account of lost profits resulting from the failure of defendant to deliver a broken shaft promptly to the repairer. Plaintiff's mill was shut down by reason of this delay. The defendant did not know, and in accepting the shipment was not told, that the mill was shut down by reason of the broken shaft. In determining proper instructions for assessing the damages, the court formulated the well known "contemplation of the parties" formula. It has thus come to be treated as a damage formula. The court further said: "The judge ought therefore to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages." This sentence discloses

⁸ 9 Exch. 341 (1854). These cases are subject to a similar analysis: *Cory v. Thames Ironworks & Shipbuilding Co.* (1868) L. R. 3 Q. B. 181; *Horne v. Midland Railway Co.* (1872) L. R. 7 C. P. 583; *Booth v. Spuyten Duyvil Rolling Mill Co.* (1875) 60 N. Y. 487; *Guertkow Bros. Co. v. Andrews* (1896) 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909.

the true purpose of the formula. Loss of profits from the mill's operation was an interest outside the scope of the agreement made for the carriage of the broken shaft. The court so declared. Courts do so in every instance if the facts are clear. The only function for a jury in such a case is to settle disputed facts. The formula is one for use in determining whether the *interest* involved is protected by the agreement. And it is not a contemplation of *consequences* from a possible breach, but a contemplation of *interests* which may be protected by the contract. Parties, in making contracts, rarely contemplate *the losses* which would result from its breach. But they do count the advantages they will gain from its performance. *What interests does the contract promote or serve?* These are actually considered in most part, and those which are shown to have been considered or reasonably falling within the terms in view of the language used and the background of the transaction, mark its boundaries—the limits of protection under it. Did the parties intend (using intention in the sense indicated above) that the injured interest was to be protected? Did this agreement fairly comprehend the advantage now claimed to have been lost? If such was not so intended or comprehended necessarily there can be no recovery for damages resulting from its injury or loss. Damages are therefore denied but only as an incidental result of the application of the rule to a larger issue. On the other hand, if the interest was a protected one in contemplation of the parties, damages will be assessed on the basis for measuring damages as in cases of any character. This will form the subject

of a later chapter. The point to be emphasized here is that contemplation or foresight of the parties as to the consequences which may follow a breach of the contract is utterly immaterial in this process except as one of the many factors to be taken into consideration in determining the larger problem of whether the injured interest fell within the protection of the contract terms. More than this, it is highly misleading and pernicious to emphasize it as the sole or controlling factor.

An illustration or so will make the point clear. D makes a contract to supply P with certain goods at a specific date. D fails to perform. P may have had several interests which might have been served by this contract. He could have sold the goods on the market and obtained a profit. He could have filled a contract of resale that he had made of the goods. He might have used them for fitting out his own enterprise. He sues D for breach of the contract. The very first question for determination, assuming a failure to deliver the goods, will be what interest of P was covered by this contract? Was it his interest in making a sale of the goods on the market? Was it to fill a special contract he had made? Was it in fitting out an adventure? The facts of the agreement having been ascertained, the court should determine that one of these interests was intended to be served by the contract. One or more of these objects was in the "contemplation of the parties." If nothing was said in the transaction about a special contract of the goods by P, and if D knew nothing of such fact, that interest will be excluded. Likewise as to the interest P had in fitting out his enterprise if such were

not made known. Hence, the *only* interest, in the absence of peculiar information that will be recognized as covered by their contract, will be P's interest in making a resale of the goods on the market, this being a standardized interest. This being determined, the only other problem that the court will submit will be the damage element. First, what are the items of loss resulting from the injury to this protected interest, the second, their valuation in terms of money. On the other hand, if it appear that the parties contemplated P's filling an order with such goods or in making a special use of them, then such interest of P will be recognized, and the damage element will be determined accordingly in keeping with the rules of damages—the rules of certainty, the rules governing evaluation, etc., which are peculiarly rules pertaining to the damage problem.

Suppose that D promises to pay P money on a certain day. P may have various interests that would be served by that contract—interest on his money, the payment of certain debts of his own that would become due at the date of payment, the purchase of a farm, or the making of a speculative investment. The interest that will be given protection by the court will be the one which was in the contemplation of the parties, and the damages will be determined on that basis.

The "contemplation of the parties" formula, whether made use of by court or jury, is designed to determine the interests of P covered by the transaction between the parties. It makes no difference what other interests of P might have been injured by a failure of D to perform his

contract, those interests cannot be the basis for the recovery of damages. This formula is neither a rule of damages, except incidentally, nor a rule of causation.⁹

Causation as a problem rarely arises in contract cases. In the cases mentioned the courts assume that if the interest involved is a protected one, and the plaintiff is damaged by a failure of D to perform, such failure to perform is the cause of the damage. The causal connection between nonperformance and the damages is taken for granted. The court handles the problem without even recognizing that it is a problem at all. Yet there are some cases where it does come to surface.

P contracts with D to send a telegram. D fails to deliver it. P may have several interests in the contract.¹⁰ What interest will be recognized by the court depends upon what the parties contemplated. If it be a social interest, the court may say that the law does not protect such an interest and end the case, although P suffered damage. If it be a death message, the court may say that the law does not protect such sentimental interests. Or the court may say that it will protect such an interest. *In the latter case, if it appears that although the message had been*

⁹ Professor Patterson makes the same point but in terms of "Risk." He says: "The rule of *Hadley v. Baxendale* is an attempt to restrict the promisor's liability for breach of promise to those consequences, the risk of which he knew about, or must be taken to have known about, when he made the contract." *The Apportionment of Business Risks*, 24 Col. Law Rev. 342.

¹⁰ It may be a social communication. It may be a death message, representing a sentimental interest. It may pertain to a business interest.

*promptly delivered, P either would or could not have attended the funeral of his deceased relative, the court will deny a recovery.*¹¹ The basis would be that D's failure of performance did not *cause* the loss. Causation would be the same as in a tort case—a pure fact inquiry.

Causal relation comes to surface in other contract cases, as, for example, in insurance contracts. The hazards insured against are fire, windstorm, tornado, hurricane, or hail. The defense may be that neither, or that one and not the other, caused the loss.¹² The cause inquiry in each case is one of fact only. But there also may be, and usually is, the problem of whether the particular hazard is covered by the policy, and this is constantly confused with the cause issue proper.¹³ But it is believed that no formula other than that hereinafter suggested in tort cases can be used to determine the latter issue in such cases.¹⁴

Suffice it to say here that the "contemplation of the parties" formula, so often mistaken for a causation rule, has no place in working out causal connection between a breach of contract and the resulting damages. It plays no such minor rôle in contract liability.¹⁵

¹¹ *Western Union v. Mobley*, 220 S. W. 611 (1920).

¹² *Hartford Fire Ins. Co. v. Nelson* (1902) 64 Kan. 115, 67 P. 440; *Jordan v. Iowa Mutual Tornado Ins. Co.* (1911) 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266.

¹³ *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.* (C. C. A. 1912) 201 F. 617, Ann. Cas. 1915A, 637.

¹⁴ *New York & Boston Despatch Express Co. v. Traders' & Mechanics' Ins. Co.* (1882) 132 Mass. 377, 42 Am. Rep. 440.

¹⁵ See *Berquist v. Kreidler* (1924) 158 Minn. 127, 196 N. W. 964. But see note, 11 Cornell Law Quart. 540.

CHAPTER 3

THE SAME PROBLEMS IN CRIME

The basis of the criminal law is the protection of the interests of society as a whole. In one form or another the conduct which constitutes crime has been forbidden and in almost all jurisdictions this has been done by statute. Hence, whether the public's interest has been protected against a defendant's conduct in any given case is always the primary question. There is none of the elusiveness to be found at this point as in tort and contract. By reason of the definiteness which centuries of legislation and litigation have given to the criminal law and the recognition which the courts have given this problem as such, it seldom presents any difficulty. This suggests that a like recognition in tort would tend to bring about a like result. Nevertheless, in crime as elsewhere, the problem is always present and must either be passed upon expressly or its decision must be taken for granted.

In *U. S. v. Ramsay*,¹ defendant was charged in the federal district court as an accessory to a murder. At that time Congress had not declared such an act to be an offense. The indictment was quashed because there was no legal protection against such conduct.

In *Regina v. Murton*,² it was held that defendant was not liable for having caused the death of deceased by breaking her heart. The law affords no protection against

¹ *Hempstead*, 481, Fed. Cas. No. 16115 (1847).

² 3 F. & F. 492.

such hazard. It is not a risk protected against by law, hence not one incurred by an individual in society.

In *Anderson v. State*,³ defendants were charged with negligent homicide. They were brakemen on a train which in its operation ran over and killed a child. It was clear that they saw the child or could have done so and could have given warning to the engineer in time to have saved the child. The court held that they were not liable inasmuch as they were not charged with operating the engine, looking out for obstructions and the like, and, therefore, there was no infraction of the rule of law invoked. Their conduct did not fall within the condemnation of that rule.

The principle is a familiar one. The public has no protection of its interest in absence of some rule condemning under a penalty the conduct complained of. It is equally well known that prosecutors and grand juries sometimes make mistakes in invoking the proper rule which has been violated. This corresponds to the similar problem in tort already discussed. As there, both phases of the question are always for the court.

In *Regina v. Burnett*,⁴ defendant was convicted of manslaughter for making fireworks in his shop contrary to statute. While he was away fire broke out in his shop by accident, or negligence of a servant, and an exploding rocket set fire to a house across the street in which the deceased was at the time and she was burned to death. In

³ 27 Tex. App. 177, 11 S. W. 33, 3 L. R. A. 64, 11 Am. St. Rep. 189.

⁴ 28 L. J. M. C. 27 (1858).

reversing a conviction, the court apparently thought the cause element was too dim. Cockburn, C. J., said: "The prisoner kept a quantity of fireworks in his house, but that alone did not cause the fire by which the death was occasioned. It was the superadded negligence of some one else that caused it. Had the death proceeded from the natural consequence of this unlawful keeping of the fireworks, as, for instance, if from the prisoner's negligent keeping of them a rocket had gone off in spontaneous combustion and so caused the death, the conviction might, I think, have been maintained. But here the death was caused by the act of the defendant plus the act of some one else."

The interests of the public sought to be protected by the statute were no doubt the lives, limbs and property of its individual members. Such an interest was actually injured through a violation of the rule. The court simply did not give the full limit of protection to this interest. The risk that defendant ran was not an absolute one. There is a limit to the risks incurred in cases of this nature as in civil cases. The court suggests that had defendant been negligent in keeping the fireworks there would have been liability. *Could negligence add anything to a positive violation of the law?* Assuming Cockburn's dictum to be correct, liability in that case would have been based on some *other* rule than the mere violation of the statute, to wit, the rule at the basis of involuntary manslaughter. In fact, the prosecution here was based on manslaughter, but it was held not applicable to the facts.⁵

⁵ Clark's Criminal Law (3d Ed.) 229.

The result of this decision is that the statute did not impose responsibility for the death of deceased, irrespective of cause. The decision, of course, had nothing to do with defendant's liability for the penalty prescribed for the violation of the statute.

In *Regina v. Pocock*,⁶ it was sought to charge the trustee of a highway with manslaughter on account of the death of a traveller whose cart fell into a hole in the road, causing him to be thrown out and suffer injuries from which he died. The court quashed the inquisition. The interest was not within the protection of the rule invoked. The risk was not one incurred by defendant under his trusteeship. The problem was not one of cause but one of defining the scope of the rule in view of the interests to be served.

In *Regina v. Mitchell*,⁷ defendant was convicted of murder. She had directed the nurse of her infant to give it laudanum in quantities which would have caused its death. The nurse had no intention of giving the medicine but left it where a five year old child, in the nurse's absence, got the medicine and gave the infant a large dose from which it died. Here the interest was a protected one. The risk was within the scope of the rule invoked. That the conduct of the defendant was an operative factor in the result was of ready determination. Cause here was a pure question of fact as in all cases when it is cleared of

⁶ Q. B. 5 Cox, C. C. 172 (1851).

⁷ 2 Moody 120 (Crown Cases Reserved, 1840).

other issues. The case illustrates the simplicity of the cause issue.⁸

In *Rex v. De Marny*,⁹ defendant was indicted for selling and publishing and causing and procuring obscene literature to be sold. He, as the editor of a newspaper, had published advertisements of books and photographs which he knew to be obscene. Readers of the advertisements had purchased the publications. The court's only problem was to determine whether defendant's act fell within the scope of the statute. There was no issue of causation; it was clear.¹⁰

In *Taylor v. State*,¹¹ appellant and his associates who were engaged in a train robbery took Johnson, deceased, from the engine to the express car, a place of danger and there he was killed by a shot from those resisting the robbery. On a charge of murder defendant was found guilty. The court said: "The whole question here is one of causal connection." This was erroneous. The question was whether such conduct fell within the scope of the rule relied upon to vindicate the public's interest in the life of a citizen.¹²

In *Commonwealth v. Campbell*,¹³ the question was whether defendant who was one of a number of rioters

⁸ See, also, *Gore's Case* (K. B. 1611) 9 Coke, 81.

⁹ *Crown Cases Reserved* [1907] 1 K. B. 388.

¹⁰ See the very recent cases of *Fasneo v. U. S.*, 47 S. Ct. 201 (1926); *Dygart v. U. S.*, 47 S. Ct. 234 (1926), involving similar problems.

¹¹ 41 Tex. Cr. R. 564, 55 S. W. 961 (1900).

¹² *Keaton v. State*, 41 Tex. Cr. R. 621, 57 S. W. 1125.

¹³ 7 Allen, 541 (Mass. 1863).

could be held for the homicide of a bystander who was killed by a shot from soldiers who were seeking to quell the riot. The court held not, indicating a lack of causal connection. But causal relation was not a problem. The question was whether the rule invoked comprehended this sort of risk. In this, as in the preceding case, the court was called on to determine the boundaries of the rule involved, not upon a consideration of the lone factor of causation, but upon innumerable factors. The solution of the problem called for a declaration of policy.¹⁴

In *Regina v. Fretwell*,¹⁵ defendant was convicted of murder for the death of Elizabeth Bradley, he having procured for her a drug for the purpose of bringing about an abortion. He acted at the instigation of deceased in procuring the drug under threats of self-destruction if such were not supplied. Defendant did not administer the drug or advise that it be taken; he merely knew of her purpose and procured the drug for her. The conviction was set aside. It was considered that the statute relied on did not cover this character of conduct. This was the only problem; causal connection was not an issue.

In *State v. Block*,¹⁶ defendant was charged with criminal negligence in so driving an automobile as to cause deceased, a passenger, to be thrown out and injured so that he died. The defense was that deceased was a sot having an alcoholic brain which brought about the delirium tre-

¹⁴ *Com. v. Moore* (Ky.) 88 S. W. 1086, 2 L. R. A. (N. S.) 719, *State v. Oxendine*, 187 N. C. 658, 152 S. E. 568.

¹⁵ *Crown Cases Reserved*, Leigh & Cave 161 (1862).

¹⁶ 87 Conn. 573, 89 A. 167, 49 L. R. A. (N. S.) 913.

mens causing his death. A conviction was held proper. The interest was one protected under the law. The public has an interest even in the life of a drunkard. The proper rule was invoked. That defendant's conduct was a contributing factor to the death was undoubted.

These cases mark the distinction between the primary problem of defining the scope of the protection afforded by the rule invoked, and one of causal connection. In a later chapter the cause element proper will be taken up and certain supposedly hard cases will be considered.¹⁷ It is not usually a difficult one in crime as the complexities of other issues do not prevent its standing out in naked simplicity.

¹⁷ It may be remarked that the ordinary causal relation case arising in criminal law is of the type of *People v. Lewis*, 124 Cal 551, 57 P. 470, 45 L. R. A. 783.

CHAPTER 4

THE SAME PROBLEMS IN NEGLIGENCE CASES
—FUNCTIONS OF JUDGE AND JURY

SECTION 1

GENERALLY

In the fields of Tort and Crime the particular wrongs, with the exception of those founded on the negligence concept, are relatively well defined. The constituents of assault, battery, false imprisonment, larceny, deceit, murder, burglary, malicious prosecution, libel and slander, and the other classified wrongs, have for most part become crystallized. The court's functions in these cases are performed with comparative ease and certainty. The rules can be given to the jury with rather marked precision. The jury, in turn, having definite rules to follow, encounter little difficulty in comprehending them and applying them to the facts. The process as a whole is standardized and few perplexing situations arise. For this reason, when an attempt is made either to bring some new interest within the protection of one of these well-defined classes of wrongs, or to make the rules at the basis of such wrongs, cover some new type of risk, the problem presents itself with comparative boldness. As already indicated, when this is the case, the courts normally deal with it both intelligently and satisfactorily. There is no need for further consideration of those classes of wrongs. But in dealing with those which rest upon the negligence con-

cept, we find neither simplicity, crystallization of rule (outside of certain well-recognized relations and minor police regulations), nor a process subject to a high standardization.

The nature of negligence continues to be a subject of dispute.¹ No doubt the term "negligence" is merely a convenient term under which to group a number of instances of failure to conform to standards of conduct insisted on by society, which instances have never been specifically designated by a more specific name.² Notwithstanding the disagreement on this point, it is conceded on all hands that the rules of law requiring reasonable conduct are predicated upon the "probability of harm" to interests within the range of unreasonable conduct.³ The probability of doing harm to the *interests* which are injured is the material consideration in the determination of negligence.⁴

¹ See Edgerton: "Negligence, Inadvertence and Indifference; the Relation of Mental States to Negligence," 39 Harv. Law Rev. 849.

² Bohlen: An unpublished memorandum.

³ See Professor Bohlen: Mixed Questions of Law and Fact, 72 U. of Pa. Law Rev. 111; Studies in the Law of Torts, 601, for discussion of the general problems here under consideration.

⁴ "If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure so to do is negligence. That the danger will more probably than otherwise not be encountered on a particular occasion does not dispense with the exercise of care. * * * The test is not of the balance of probabilities, but of the existence of some probability of sufficient moment to induce action to avoid it on the part of a reasonable mind. One may be careless in shooting at an object, more probably an animal, and less probably a human being, if the doubt about it is sufficient to induce the ordinary man to refrain from

As to such interests the defendant's conduct must be reasonable, else he is a negligent wrongdoer. The point and function of this formula are constantly obscured by stating it in terms of "probable consequences." "A defendant is only liable for those consequences that he as an ordinarily prudent person should have reasonably foreseen as a probable result of his conduct" is a favorable way of phrasing it. By such phrasing it is made to appear as a determinant of consequences and thereby mistaken for a *cause* determinant. It is generally conceded that *specific* consequences do not have to be anticipated or seem probable. This can only mean that at this stage of the inquiry the consequences are not material at all; they only become so, after the injury has been found to be a negligent one, in dealing primarily with the damage problem. But it is the *interests* placed in hazard by defendant's conduct which are under the protection of the law, and it is they and they only which are to be considered in ascertaining a defendant's negligence. This confusion is impossible if the formula is correctly stated: *Should probable harm to the interests involved have been reasonably anticipated as within the range of defendant's conduct?* The high point of difficulty arises in allocating to the judge and jury their respective functions in applying this formula. What part has the judge to play? What part the jury?

shooting." *Tullgren v. Amoskeag Mfg. Co.* (N. H.) 133 A. 4, 8. See, also, *Hussey v. Boston & M. R. R. Co.* (N. H.) 133 A. 9, 15.

SECTION 2

THE JUDGE'S FUNCTIONS

Aside from his functions of directing the court's business in general, passing on the admissibility of evidence and the like, the judge has three well-defined major functions.

First: (As in those other classes of wrongs and those cases where negligence as an issue is removed by statute or is conceded by the parties, cases which we have already discussed), *the judge must also say, here, whether the injured interest is one which falls within the protection of the rule invoked by a plaintiff.*⁵ To be more specific, the court must say whether the conduct complained of subjected such interest to a hazard against which the rule affords protection. This is not saying that as a matter of fact there was a hazard or that defendant violated the rule, for these are matters of fact for the jury. It is merely saying that assuming the hazard and the violation of the rule, the court must of necessity determine whether such a peril is protected against by the rule under any circumstances—a matter of defining the limits of the rule or the protection afforded by it. By way of anticipating, this is

⁵ Professor Bohlen's position seems to be that this is an administrative function the court exercises in controlling the fixing of definite standards of conduct. See his very illuminating article cited, *supra*. We think all that Professor Bohlen says in support of his position is of even greater significance, and equally applicable, in support of the position here stated. We doubt that any help is derived from calling the function an administrative one. *Supra* n. 3.

a function that judges all too frequently abdicate. At least they perform it indirectly or under the guise of doing something else. It is a problem solely for the judge. It must be and is determined in every case either consciously or otherwise.

Second: The judge must say on the whole evidence relating to a particular issue whether more than one reasonable inference can be drawn, that is whether there is an issue for the jury's determination. This function is well recognized.

Third: If both of the preceding functions have been exercised favorably for a plaintiff in a particular case, then the judge must submit the issues that may have been raised to the jury with such instructions as will enable the jury to deal with them intelligently.

In a given case the judge having exercised his first and second functions favorably to a plaintiff in a *negligence* case, in order to determine the issue of negligence itself, he will exercise his third function by requiring the jury to determine *whether harm to plaintiff's injured interest could have been reasonably anticipated as probable by a person of ordinary prudence situated as was the defendant.*

This is the well recognized formularized standard for measuring the conduct of a defendant in a negligence case. But it must be emphasized that it has no part to play until the judge has first determined that the rule relied on protects against the sort of hazard encountered by plaintiff's interest, and has further determined that an issue on this point has been made for the jury. Let it be further noted

that the judge in exercising his *second* function may say that there is no issue for the jury on either one of two grounds. Thus the judge may find that the evidence is so lacking in probative value that no issue is raised, but on the other hand he may find with equal certainty that the evidence is so strong and clear that no issue remains for a jury. But between these two extremes the judge must proceed to exercise his third function as stated. It will be further observed that the judge's *first* and *second* functions are preliminary and successive. They both operate to exclude participation by the jury. Furthermore, that until the judge has exercised his *first* function no factual element as wrongdoing, causal connection or damage is the subject of pertinent consideration. All these are assumed.

The *first* and *second* functions of the judge are easily confused. Further distinctions need to be drawn. The first or primary function is of supreme importance. Seemingly, it is not well understood either by courts or legal writers, and perhaps never clearly outlined in the opinions of the courts. Superficially, it might seem that its performance would conclude the whole case, leaving nothing for the jury. This is not true. It is just as incumbent upon the judge to exercise this function in negligence cases as in the other classes of wrongs already considered. As will appear from the analysis of cases to follow, the courts frequently never see the problem; they leave it to the jury as a problem in causation, or the appellate court translates it into terms of causation. But it

is inconceivable that rules relied on in other classes of wrongs should have boundaries and limits while here they should not, or that a court is required in other cases to define such limits while here the court has no such duty. It is just as necessary that a judge comprehend the purpose and scope of a rule which is alleged to have been violated by the unreasonable conduct of a defendant as that it must comprehend the purpose and scope of a statute; the court must determine whether the hazard to which a plaintiff has been subjected falls within the range of the protection of the rule invoked by him. But this primary function must in no way be confused with the judge's second function which comes into play when a judge refuses to submit a case to the jury because under the facts there can be only one reasonable inference drawn. In the latter case the court directs a verdict because none other could be reached by the jury and allowed to stand. But in the exercise of his first function the judge refuses to allow plaintiff's action, or defendant's defense, because the rule relied on affords no protection or defense as the case may be. The exercise of this function is preliminary to that of the other. It may be exercised favorably to a party while he would be defeated by the exercise of the second. The two operate on wholly different subject matters. The tests for exercising them are wholly different. The direction of a verdict because of the lack of evidence, one way or the other, is determined by a consideration of whether reasonable minds could disagree on the inference to be drawn from the facts. But the determination of whether a hazard falls within the protection of a rule of law calls for

much profounder considerations. As already indicated it calls for all of those considerations involved in the law-making process whether it be by judicial or legislative sanction.⁶ How a court shall know the law—how it shall know when an interest is protected, or protected against a specific risk by a certain rule—is the most comprehensive of inquiries involved in the administration of justice. How the courts determine what the law is or should be is obviously too much to be undertaken here.⁷ Let it suffice to say at this point that it is the business of the courts to know the law; that by virtue of the immense mass of precedents in most cases the inquiry is solved by searching out the precedents; in event of conflicting precedents by choosing between them; in slightly different cases by employing analogies. It is only when some distinctive situation arises, or the incompatibilities of distinct rules develop that the problem becomes acute.

Perhaps the most striking observation which can be made concerning the problem a judge is called upon to solve by the exercise of his primary function, is that it will

⁶ The philosophical habit of the day, the frequency of legislation and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago." Holmes: "The Common Law," p. 78.

⁷ See Cardozo: *The Nature of the Judicial Process: The Growth of the Law.*

not submit to any formula. On the other hand the other problems of legal liability are readily reducible to formularization. That it will not submit to solution by formula is due to the fact that the protection to be given interests varies infinitely. Each interest must be weighed and valued with reference to every other. There can be no certain rule. The attempts to reduce the problem to formulas—generally made in terms of “proximate” causation—overlook this fact and seek to introduce uniformity where uniformity in the very nature of things cannot exist and where it would prove disastrous if the attempts were successful.⁸ The process which leaves the problem a wide open one in every case, requiring the consideration of economic and social interests on the broadest scales, offers a variable rule where only variableness obtains.⁹

⁸ This does not mean that types of cases are not to be treated with some uniformity, for such must necessarily follow as a result of precedent, but no definite formula can be worked out for dealing with new or off types.

⁹ “The rule as to remoteness of damage is based on purely practical considerations of justice and expediency. The rule relates to those cases in which damage, though in fact caused by the defendant’s wrongful act, is nevertheless caused in such a manner that the law does not consider that the defendant can be justly held responsible for it.” Salmond: *Law of Torts* (6th Ed.) p. 144. Also see H. W. Edgerton, 72 U. of Pa. Law Rev. 349, 356. This writer correctly concludes that the considerations to be weighed are indefinite in number and value, but he incorrectly concludes that they are pertinent to the causal relation issue, and are considerations for a jury. They are pertinent in determining the scope of protection to be given injured interests.

SECTION 3

THE JURY'S FUNCTIONS

The judge having determined that the injured interest falls within the protection of the rule relied on, and that there is evidence requiring a submission of the case to the jury, will, under the orthodox practice of the common law direct the jury in substance what constitutes negligence by instructing them, in one form or another, that if the defendant as a reasonably prudent person should under the circumstances have foreseen as a result of his conduct probable harm to the interests involved, then defendant was negligent. This "probability of harm" formula in varying degrees of accuracy as it is actually submitted, constitutes the universal test of negligent conduct, except in those cases for which a definite standard has been set up, either by statute or decision. The court in this way attempts to give the jury a standard by which to measure the conduct under investigation. The foresight of the ordinarily prudent person as it appears to the jury after the transaction is concluded is thus made use of as a negligence determinant. While the court by the use of this formula indicates to the jury a general standard of conduct for determining the quality of defendant's conduct, such standard is metaphysical. It has no certainty; it is in fact a fiction.¹⁰ While the jury are asked to determine whether the party's conduct measured up to that of the average

¹⁰ See Thayer: *Public Wrong and Private Action*, 27 *Harv. Law Rev.* 317, *Selected Essays on the Law of Torts*, 276.

man, they must first determine what that standard is. The court hands over this problem in the best way it can. It has no means of fixing the standard other than in the most general terms. The jury must give life to the standard. Hence, the jury are compelled to determine in a measure what is best for the social interest in every negligence case submitted to them.¹¹ Here the weighing of interests, those of the parties, as well as those of society, must be considered much as the judge must do in exercising his first function as already indicated. The jury determines what is a just standard under all the circumstances. They can make the standard high or low. That is their function. They will make the standard high or low, depending upon their common sense, experience, intelligence and judgment. Whatever the standard set by them, assuming that it is a case which should be submitted for the jury's consideration, it will be final; it will be binding on the court unless their action is in the mind of the judge outrageous. In other words, the judge's sole function at this point is to keep this agency within the bounds of reasonable action; within those bounds the jury is supreme. Likewise, the jury's determination of whether the parties' conduct has met such standard will be ascertained through the same processes and will be equally as final in the particular case. Both the standard and the parties' compliance with it are thus determined after the conduct has

¹¹ In those cases in which the conduct of the average man has already become fixed either by legislation or judicial precedent there is no such question for the jury; their function there is merely to determine what the conduct of defendant was.

taken place. The jury having no fixed basis of testing the conduct of the parties, must as best they can, put themselves in the position of the parties prior to the transaction involved, consider what each knew or should have known, consider what interests each should have contemplated as likely to be injured by his conduct alone and in connection with the conduct of others, or things, which might be reasonably expected, and considering all the interests which were likely to be involved, including those of the plaintiff, those of the defendant, as well as those of society in general, and looking at what was actually done by the parties and what has actually resulted from the combined action and reaction of the parties and outside factors, determine whether the conduct of the party sought to be charged was reasonable, i. e., in keeping with the standard they have set up under the judge's instructions. This is at best but a poor summation of what a jury may consider in their deliberations on such an issue. Thus it is in the consideration of this problem that the jury exercise their most important function and have their broadest range. It is here that they must determine whether the defendant shall bear the losses which have accrued, assuming that his conduct produced them, or whether it is best that the plaintiff shall bear his own loss. The requirements necessary for making out this element of wrongdoing in a negligence case are sufficiently comprehensive to allow full play to all considerations which can enter into the reasonableness of conduct.

It has already been observed that the jury's function in determining negligence, and the process by which such

is done, are not altogether dissimilar from the judge's function and the process he must follow in determining whether the rule invoked is designed to protect the interest involved. But they are wholly distinct. The judge may and should consider all those factors in determining his primary problem which the jury consider in making their findings. But he may consider, and usually will consider, a great many more. The judge's function is altogether an excursion into the domain of policy; the process is the same as that required in determining whether there shall be a rule of law at all. On the other hand the jury's function is one primarily of fact finding. And it would be nothing more were it not for the impossibility which the court faces in supplying a comparatively definite standard of conduct as a yardstick for measuring the conduct in litigation. In other classes of cases the court is rather successful in giving a definite standard; in negligence cases at best the judge can only give an abstract formula which requires the jury to set up a standard in their own minds before they can perform their fact finding function. It is in setting up this standard that the jury exercise incidentally but in reality a lawmaking function.¹² While this standard only serves for the particular case and cannot become a precedent for subsequent cases, yet in subsequent cases a jury must likewise in each of them supply a standard and this process must continue until such time as a definite standard of conduct is arrived at. When that is done in any particular line of cases, the judge will

¹² See Holmes: *The Common Law*, p. 126.

thereafter supply the jury with such standard and the jury's only function will be to determine whether defendant's conduct measures up to it. In one sense the law is made in each case after the transaction has been completed; a sort of *ex post facto* method.

By reason of this complex process in such cases and by reason of the surface similarities between the judge's primary function and that of the jury, confusion is easily developed. Judges habitually fall into two grave errors in handling cases of this nature. First, they do not recognize that they have a function to perform by way of defining the limits of the rule involved. Second, they place the burden on the jury under the guise of determining "proximate cause." And the stupid part of it all is that the attempt is made to use the "probability of harm" formula, employed to determine negligence, also as a test of this so-called "proximate cause" issue.¹³ Frequently a third error is made. It happens in this way: If the result obtained from erroneously leaving the fictitious "cause" issue to the jury is palpably unjust, or if the result of leaving it to the jury would probably be so, the appellate court declares *as a matter of law* that there was in fact no causal relation issue to be left to the jury, and proceeds to deal with it as an issue of causation for the court. Here they make use of all those weighted phrases as "remote," "unforeseen," "intervening agencies," "independent agencies," and a score of others which are meaningless as solvents except they provide a smoke screen behind which

¹³ See Salmond: *Law of Torts* (6th Ed.) p. 138.

the court can retire from an awkward position. They do here under the guise of determining "proximate cause" what should have been done by way of defining the scope of protection afforded by the rule invoked.

Cases are frequently left to a jury's determination, which for one reason or another are allowed to stand, when, if the trial judge had exercised his proper function they would have been determined differently. Here the judge abdicates his primary function. Appellate courts on the other hand, are inclined under the guise of the "proximate cause" doctrine to take cases away from the jury which properly belong to them. This may not only result in injustice in the particular case, but it always establishes a precedent to clutter the law generally.¹⁴ All in all this confused method of dealing with the problem, though widely accepted, is a wretched one, inexcusably perpetuated by intelligent judges and utterly devoid of scientific foundation. The law cannot progress in this broad and increasingly important field, the negligence concept cannot be developed to include its legitimate territory, until this error is eradicated root and branch.

SECTION 4

CASES ANALYZED

The following cases were made to turn on the issue of causal relation. In scarcely one of them was that issue involved. In nearly every case the decisive point is to be found elsewhere. The group represents errors of this nature:

¹⁴ See Bohlen: Mixed Question of Law and Fact, 72 U. of Pa. Law Rev. 111; Studies in the Law of Torts, 601.

(1) The rule invoked by plaintiff was inappropriate for the interest's protection against the risk encountered but the problem is assumed to involve a question of causal relation.¹⁵

(2) The scope of the protection to be given an interest is mistaken for a problem of causal relation. (Most of the cases analyzed illustrate this error.)

(3) The issue of negligence is mistaken for the issue of causal relation.¹⁶

(4) The evidence raising no issue of negligence, thus demanding a directed verdict on that point, the problem is treated as one of causal relation for the court.¹⁷

(5) The evidence raising no issue of causal relation, thus demanding a directed verdict on such issue, the problem is treated as a question of causal relation for the court.¹⁸

(6) The issue of negligence or causal relation being for the jury, but the court being unwilling to risk the jury to pass on the issue, it is treated by the court as its own problem.¹⁹

In *Sharp v. Powell*,²⁰ defendant washed a van in a pub-

¹⁵ See *Bigham v. T. & P. Ry.*, *supra*, p. 31. A number of such cases are given in the first chapter.

¹⁶ See *G. H. & S. A. Ry. Co. v. Bell*, *infra*, p. 81; *Belden v. Hooper*, *infra*, 83.

¹⁷ See *Sharp v. Powell*, *infra*, No. 20.

¹⁸ *Andrews v. Kinsel*, *infra*, p. 103; *Mutz v. City of Akron*, *infra*, p. 110. In these causal relation was too clear for doubt. This is the normal case.

¹⁹ See "*Lusitania*," 251 F. 715, *infra*, p. 158; *Stone v. Boston & Albany Ry. Co.*, *infra*, p. 108.

²⁰ *Common Pleas, L. R. 7 C. P. 253.*

lic street. The water ran down the gutter to a grating leading to a sewer. The grating being frozen over the water spread over a portion of the street and froze. Defendant was not shown to have known that the grating was obstructed. Plaintiff's horse while passing over the place slipped on the ice and broke its leg. Grove, J., said: "I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The damage complained of was not proximately caused by the original wrongful act of the defendant."

It would be difficult to imagine a clearer case of causal relation. But this was not the problem. There was merely no basis for finding that defendant should have anticipated as a probable result of his act any harm to plaintiff's interest which was in fact injured. This issue would have been for the jury but there was no evidence of negligence. It was the judge's function here to direct a verdict for lack of evidence. But as has been done in numerous cases, the judge assumed defendant's conduct to be wrongful and then denied causal connection between the act and the hurt. He erred in both particulars.²¹

In *Hoag v. Lake Shore, etc., Ry. Co.*,²² defendant's servants ran a train of cars loaded with crude oil into a

²¹ If this case be considered as involving the violation of a statute or ordinance, then the court should have merely held the hazard not within its scope, assuming that to have been its judgment.

²² 85 Pa. 293, 27 Am. Rep. 653.

slide which obstructed the track. Some of the cars were derailed and burst. The oil became ignited and ran down a swollen stream which passed plaintiff's property some three or four hundred feet below. Plaintiff's property having been destroyed by fire set by the stream of burning oil, he sued defendant. The court resolved as a matter of law that defendant's negligence was *not* the proximate cause of the injury.

In *Kuhn v. Jewett*,²³ under very similar facts, except that the building destroyed was a little further away, the court resolved that defendant's act *was* the proximate cause of the injury.

There was no problem of causal relation involved. The problems were: (1) Was plaintiff's interest within the protection of the rule invoked, i. e. the obligation upon defendant to operate its train with care? (2) Should defendant have reasonably foreseen injury to plaintiff's interest as a probable result of its conduct? The first was for the judge. Both courts considered it a question of proximate cause, and under that guise, one court held the interest was not protected against such hazard, while the other held that it was. The second problem was for the jury. Whether there was negligence was perhaps the only doubtful issue, but it was assumed by both courts.

Both courts erred, first, in assuming any question of causal relation was involved, and, second, in assuming the existence of negligence when such was doubtful.

In *T. & B. V. Ry. Co. v. Blackshear*,²⁴ a laborer in a

²³ 32 N. J. Eq. 647.

²⁴ 106 Tex. 515, 172 S. W. 544.

field adjacent to the right of way was struck by a loose spike hurled by the flange of a car wheel during the passing of a train which was being run at a rapid rate of speed. It was alleged that the railroad company was negligent in allowing spikes to be left upon the track or loose in the ties. The court very properly denied recovery. It said:

✓ “It is not negligence to fail to provide against an accident of such nature that nobody could have foreseen it, and that no prudence could have anticipated the need of guarding against it. * * *. The railroad company was not guilty of negligence and is not liable for the injuries which *it caused*.”

That harm was actually done in the most direct manner cannot be gainsaid. But there was no probability of doing harm to any interest of the plaintiff, whatever might be said as to those persons who might have been expected to be on the right of way. Thus the trial court should have instructed the jury to return a verdict for the defendant for want of any proof of negligence. The court could, perhaps, also have said that the hazard was not within the scope of the protection of the rule invoked. This would have been equally decisive, and being a preliminary question should have been decided first.

In *G. H. & S. A. Ry. Co. v. Bell*,²⁵ plaintiff sued to recover for injuries received while a passenger as a result of a stray shot received during a fight between two other passengers. The negligence alleged was the failure of

²⁵ 110 Tex. 104, 216 S. W. 390.

defendant's conductor to remove a rowdy passenger from the coach after being notified of his offensive conduct toward other passengers. The defense was the lack of proximate cause. The court said:

"The test as to whether a given act may be deemed the proximate cause of an injury is simply whether in the light of all the attending circumstances the injury was such as ought reasonably to have been anticipated as a consequence of the act. The question of proximate cause here was one for the jury. With a drunken negro of Willie's manifest character in the car, with his conduct known to the conductor, it did not require much foresight to see that some kind of a fight at his initiative was probable and would not long be postponed. It was not necessary that the conductor be able to anticipate the exact kind of a fight or just how it would occur. There is ample warrant in the proof for concluding that he was reasonably bound to anticipate Willie's having a fight with somebody. If so, he ought reasonably to have foreseen that some innocent passenger might be injured in the course of the fight. That would not be an improbable consequence in a car crowded with passengers and with a drunken negro of Willie's sort a prime actor in the *mêlée*."

The court, as has been done in so many cases, transformed the negligence issue, the only one in the case, into one of "proximate cause" and purported to solve it by the negligence formula. More accurately, perhaps, the court misconceived the issue of negligence as one of cause. Causal connection was too clear for doubt. This character of error is unpardonable and has produced intermina-

ble confusion.²⁶ That the risk here fell within the protection of the rule relied on has been recognized in many instances.

Plaintiff charged defendant, a druggist, with negligence in delivering to plaintiff, a boy of fifteen, two bottles of carbon disulphide, ordered by the boy's father for the destruction of weevils in wheat. Plaintiff placed the bottles beside him in the bed of a Ford car. While driving about town one of the bottles was broken and the contents became ignited in some undisclosed way and plaintiff was burned. Held: (majority opinion) "Conceding the negligence * * * the burning was caused by the unforeseen intervening and efficient agency of 'a spark of some sort of a very heated piece of steel or iron' which made the fluid combustible. This unknown, but nevertheless certain, origin of the fire was the proximate cause of plaintiff's injury, an extraordinary consequence which defendant could not reasonably have anticipated and for which he cannot be subjected to liability."²⁷

This case is a typical one. The court assumed negligence when there was none shown.²⁸ Harvey, J., in a concurring opinion, noted this point:

"Since there was no negligence on the part of the de-

²⁶ "To treat as a question of remoteness what is really a question as to the existence of negligence or other fault is a fertile source of confusion." Salmond: *Law of Torts*, p. 144 (6th Ed.).

²⁷ *Beldon v. Hooper* (Kan.) 224 P. 34 (1924).

²⁸ *Stephen v. Brigg* (Ga. App.) 134 S. E. 821 (1926), is another such case. In *The Milwaukee Bridge*, 15 F.(2d) 249 (1926), the court likewise turns the case on lack of causal connection, when there was merely no negligence.

fendant * * * there is no need for controversy over the subsequent question of whether defendant's negligence was the proximate cause of the injury."

The majority treated the issue of negligence as an issue of causation. Moreover, they determined the cause of the fire itself although they had to rely on their imagination in order to do so.

In *Eberhardt v. Glasco Mutual Ins. Assn.*,²⁹ the team behind which plaintiff was riding, becoming frightened by a passing automobile, veered from the roadway and caused the vehicle to come in contact with a guy wire attached to a telephone post located at the road's boundary. Plaintiff was thrown out and hurt. The negligence alleged was the maintenance of a pole and guy wire in such close proximity to the road. The court denied recovery for lack of "proximate" cause. The peculiar fact is that causal relation was not an issue. But whether negligence was shown was questionable. So much so, that the court's action in sustaining the demurrer to plaintiff's evidence was doubtless correct. This was the decisive issue for it could hardly be held that such a risk as this was not protected against by the rule invoked if the location of the post and wire could be considered a wrongful act. The court ostensibly employed the jury's test for determining negligence as a test for causal connection. Such vain attempts to reduce causal relation, a quantitative problem, to the terms of a qualitative formula, must always prove disconcerting.

²⁹ 139 P. 416 (Kan. 1914).

In *Wood v. Penn. Ry. Co.*,³⁰ plaintiff, while standing on a railway platform awaiting the arrival of a train, was hit and injured by the dead body of a person who was struck at a nearby crossing by defendant's train and hurled upon the platform. The court, assuming defendant to have been negligent in operating its train, denied recovery to plaintiff, saying: "He fails because his injury was a consequence so remote that defendant could not reasonably foresee it." The court mistook the issue. The whole argument of the court was directed at showing that defendant could not have reasonably anticipated harm to the plaintiff or one in his position by the operation of its train at the speed it was travelling, irrespective of whether signals for the crossing were given. Under the court's theory no injury to any interest of the plaintiff was foreseeable. This was relevant to the issue of negligence, not causal connection. And unless the court considered that there was no room for two reasonable opinions that issue should have gone to the jury.

Perhaps, it might also have been said that the violation of the rule which protected persons using the crossing could not be invoked by the plaintiff as to whom the rule afforded no protection. That would have been a problem falling within the court's province. Unless resolved favorably to plaintiff, all other issues would have been impertinent. From any standpoint the case was decided on a false issue.³¹

³⁰ 177 Pa. 306, 35 A. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728 (1896).

³¹ See 9 Va. Law Reg. (N. S.) 452-455.

In *Hill v. Winsor*,³² defendant's tugboat collided with the fender of a bridge on which plaintiff was at work, causing the braces between certain piles to fall out and plaintiff to be caught between the piles and hurt. The rule invoked by plaintiff was clearly appropriate. The sole question, as very properly held by the court, was whether defendant was negligent. This depended upon whether defendant should have contemplated probable injury to those at work upon the structure as a result of running against it. Plaintiff's interest in his bodily integrity was unreasonably subjected to danger. The peculiar type of injury that followed was wholly immaterial to any inquiry before the court. There was no cause problem in the case.

In *Illinois Central Ry. Co. v. Siler*,³³ fire from defendant's engine ignited large quantities of combustible material which had been permitted to accumulate on its right of way. The fire was communicated to the adjacent premises of decedent and while she was attempting to extinguish the fire and protect her dwelling, her clothing was ignited and she was burned so severely that she died. Defendant insisted there was a lack of proximate cause, but the court held otherwise saying that proximate cause is always a question of fact for the jury so long as more than one reasonable conclusion can be drawn from the facts.

There was no cause issue involved in the case; the defendant's conduct as a cause factor was clear. The first question was whether the interest injured fell within the

³² 118 Mass. 251 (1875).

³³ 239 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819.

protection of the rule which required defendant to conduct its railroad operations reasonably with respect to adjacent occupiers of premises, and particularly whether such rule protected it against this sort of hazard. The court necessarily held that it did. The second question was whether defendant should have reasonably anticipated injury to deceased's person by permitting its right of way to become incumbered with rubbish. This was a question for the jury. There were innumerable factors to be considered both by court and jury respectively. Among other factors, the court in exercising its primary function would consider these: The amount of such material, its combustibility, the season of the year, the chances for its becoming ignited from the operation of trains, the state of the adjoining premises, the distance of decedent's house, the fact that she would probably undertake to protect her property and the facilities for doing so, the probability of fire at night while deceased was asleep, the relative social values of the operation of defendant's railroad and deceased's bodily security, the cost of keeping a clean right of way, etc. On the other hand the jury, under the general instructions of the court as already outlined, would weigh the probabilities of harm from such a situation and in the light of a reasonable standard of conduct determine the extent of the risk and whether in this case it should fall on defendant or deceased. This is the process involved in finding negligence—which was the only real issue in the case. The jury in any case in which an issue is raised may find either way. The cases which deny liability in similar instances for lack of "proximate causation" are legal

atrocities.³⁴ The point is well put in the somewhat similar case of *Smith v. London & S. W. Ry. Co.*³⁵ by Channell, B.: "I quite agree that * * * the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not * * *; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Also, by Blackburn, J., "I also agree that what the defendants might reasonably anticipate is * * * only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."³⁶

³⁴ *Seale v. Railway Co.*, 65 Tex. 274; *Logan v. Wabash Ry. Co.* (Mo. App.) 70 S. W. 734; *Allison v. St. L. S. W. Ry. Co.* (Tex. Civ. App.) 257 S. W. 959. See *Liming v. I. C. Ry. Co.*, 81 Iowa, 246, 47 N. W. 66; *Blanz v. C., M. & St. P. Ry. Co.*, 110 Iowa, 611, 93 N. W. 575.

³⁵ L. R. 6 C. P. 14 (1870). In this case whether plaintiff's interest was within the range of the protection of the rule which defendant violated was seemingly assumed. Brett, J., in the Court of Common Pleas apparently sensed such a problem but he confused it with causal connection and sought to employ the "Probable Consequence" formula as a test. The other judges rejected this as a test of causal connection. This means that the most vital problem, perhaps, was not considered. But the court was clearly correct in rejecting Brett's contention as to causal relation. See Bevin: *Negligence in Law*, pp. 87-90.

³⁶ "Upon the question whether the defendant has been guilty of negligence, the rule of reasonable anticipation applies. * * * But when his fault has been established, the rule has no application upon the issue of damages." *Tullgren v. Amoskeag Mfg. Co.*,

In *Benedict Pineapple Co. v. Atlantic Coast Line Ry. Co.*,³⁷ a somewhat similar situation is presented. The negligent operation of defendant's engine set fire to a cover used by plaintiff to protect plants and fruit from cold and frost. Before another cover could be procured the plants and fruit were damaged by the cold weather. The only problem was whether this interest was within the protection of the rule violated by defendant and upon which the plaintiff relied for recovery. That defendant's wrongful conduct contributed appreciably to the loss was beyond dispute.³⁸

The fire cases have been made the occasion for extended discussions of the cause problem, but that problem has seldom been involved.³⁹ The issue is usually one of negligence, the solution of which settles the case.⁴⁰ The problem may be sufficiently illustrated by an assumed case.

Defendant operated a railroad on First Street. The 133 A. 4, 8 (N. H. 1926). See, *contra*, *Miglioccio v. Public Service Co.* (N. J.) 130 A. 9, 10 (1925). See, also, *Re Polemis & Furness Withy & Co.* [1921] 3 K. B. 560, 90 L. J. K. B. 1353; *Ehrgott v. New York*, 96 N. Y. 264; *Steven v. Dudley*, 56 Vt. 158.

³⁷ 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92 (1908).

³⁸ *Lawrence v. Yadkin River Power Co.* (N. C.) 130 S. E. 735, is an interesting fire case raising close questions on three points: (1) Was the hazard within the range of the rule invoked? (2) Was the rule violated by defendant? (3) Did such violation cause or contribute appreciably to the loss? In a well-considered opinion the court was careful not to overemphasize the importance of the last.

³⁹ *A., T. & S. F. Ry. Co. v. Stanford*, 12 Kan. 354; *A., T. & S. F. Ry. Co. v. Bales*, 16 Kan. 252; *Anderson v. M., St. P. & S. S. M. Ry. Co.* (Minn.) 179 N. W. 45.

⁴⁰ *Hogan v. Bragg* (N. D. 1918) 170 N. W. 324.

people of the alphabet owned houses beginning at First Street and out as far as Twenty-Sixth Street. From the use of a defective spark arrester fire was communicated from one of defendant's engines to A's premises on First Street. Before the fire was checked it had burned a path from First to Twenty-Sixth Street destroying A's house on First Street, B's house on Second Street, C's house on Third Street and so on to Z's house on Twenty-Sixth Street. Each owner brings suit against defendant for loss of his property. All courts would no doubt allow A to recover. In fact most courts would direct the jury to return a verdict for A should they find that the fire was actually communicated from the engine to A's property, since the harm that is likely to result to adjoining property owners from the use of a defective spark arrester is so great, that the rule declaring such conduct to be negligent has been crystallized into a positive rule of law. A few courts would not allow B to recover although his house was destroyed by the same fire, but such are in the minority. Most courts would submit the issue of defendant's negligence to the jury to be determined by the usual test, the "probable consequence" test. And so with C's case. But what would the court do in Z's case? Some courts would probably say that Z could not recover because there was no "proximate cause" between defendant's negligence and Z's loss. This would be erroneous. The fire set out by defendant's negligence did actually cause Z's loss. *Cause* is not the weakness in Z's case. There would be two problems. The first for the court, the second for the jury. The first would require the court to say whether the

burning of Z's property interest was a hazard within the scope of the rule invoked by Z. Until the court passed on this favorably to Z, nothing further would be pertinent, for if unfavorable it would be decisive against Z. If favorable, the issue of negligence would then have to be considered. For while defendant's conduct was wrongful as to A it cannot be so confidently stated as to Z. If a reasonably prudent person should have foreseen that the use of a defective spark arrester on First Street would probably cause damage to Z's house on Twenty-Sixth Street, then defendant's negligence would have been made out. If reasonable minds could disagree as to this, then the court should submit the matter to the jury. If reasonable minds could not disagree but would say that such a result was not to be anticipated, the court should instruct a verdict for defendant.⁴¹

The same process would be applicable to each of the other cases. And it could easily happen that L would be denied a recovery while Q would not, although L's house would be several blocks nearer the origin of the fire than Q's house. Such results are constantly happening on account of the varying standards both of judges and of juries. In a negligence case the standard set up by the jury as meeting the metaphysical standard which the court directs the jury to follow is for *that* case only. The next case demands a new jury and a different standard is inevitable. The process is the same but the result may be different. This is merely one of the risks attendant upon

⁴¹ See 1 Tex. Law Rev. 254.

such a system of administering justice. A similar result would be equally possible if the several cases were tried before different judges.

Suppose in the case assumed that P were the owner of every house which was destroyed. He could seek recovery for all of them in one suit. Would this mean that he could recover for the loss of all the houses inasmuch as defendant was clearly negligent in setting fire to the one on First Street? If so, P could recover for houses on Twenty-Fifth and Twenty-Sixth Streets when if they were owned by Y and Z there could probably be no recovery.

This situation well demonstrates the fact that the probability of harm has reference to *interests* rather than to *persons* as has sometimes been thought. Necessarily there must be persons as parties to suits, but their *interests* constitute the point of emphasis here. There would be as many interests involved if P owned all the houses as if each house had a different owner. This is recognized in everyday transactions. P would have distinct interests and could, in most jurisdictions, maintain as many separate suits as he had houses or units of property. Hence, the determination of the court's preliminary problem of whether the hazard is protected against, as well as the issue of negligence, should be with reference to each unit of property in the same manner as if there were separate owners maintaining separate suits. The problem may conceivably become complex, but it is not for that reason translated into one of causation. The problem would be the same, and subject to the same process, as in the sim-

plest case. Whatever the case, the judge's power to circumscribe the scope or reach of the rule is always a limitation upon the jury's power. The jury's function does not come into play until the court has first determined that the interest of plaintiff is protected by the rule invoked. It is then the jury's function to say whether the defendant's conduct was an infraction of that rule.

In *Eckert v. Long Island Ry. Co.*,⁴² deceased in rescuing a child from the track in front of a negligently operated train of defendant's was killed. Deceased jumped in front of the train in order to save the child. The first question was for the court: Was deceased's interest within the protection of the rule invoked? The court necessarily held that it was, inasmuch as the case was not precluded at that point. This, as all such questions, was a matter of broad policy. The defense was contributory negligence. The second question was also for the court, thus: Was deceased's conduct a hazard which fell within the scope of the rule at the basis of contributory negligence? The court must have so held as the issue was submitted to the jury. This also was a question of policy. The court having held that there was evidence to support both the issue of defendant's negligence and deceased's contributory negligence, the jury likewise had two problems: First, was defendant negligent in subjecting the interest of deceased to the particular hazard here involved? Such being exclusively for the jury, it was found under an application of the "probability of harm" formula by the

⁴² 43 N. Y. 502 (1870).

jury that there was negligence. The second question: Was deceased contributorily negligent in subjecting himself to the hazard which defendant created?⁴³ Inasmuch as the court in the exercise of all its functions left the matter to the jury for determination by an application of the "probability of harm" formula, the jury was free to determine the issue either way, and it was in the proper exercise of its function in finding an absence of contributory negligence. The probability of harm from deceased's own conduct was very great indeed, but the jury's function permits it in setting up the standard man to consider his actions in view of *all* factors. Here deceased was acting in an emergency which was created by defendant and which was of the utmost significance in determining the quality of the conduct both of defendant and deceased. The point of highest importance is that while the case may be a close one at each step, still the process for its solution was accurately followed. We have no better way of administering justice and must accept such results as one of its incidents, although another court and jury might conceivably resolve each issue to the contrary.⁴⁴

As for a cause issue, there was none. It was clear that the death was caused by both the conduct of defendant

⁴³ Doubtless if it had been a dog on the track instead of a child the court would have resolved the case against plaintiff at this point by exercising its secondary function and holding the evidence clearly to show deceased's contributory negligence.

⁴⁴ See *Wagner v. Int. Ry. Co.*, 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1.

and deceased. As long as *defendant's* conduct was a substantial factor, the cause problem offered no difficulty.

In *A. T. & S. F. Ry. Co. v. Parry*,⁴⁵ deceased, a passenger, was taken from the train at a station in a partially unconscious and irresponsible condition and placed in charge of the depot master. In this condition he was permitted to depart from the depot and was later found dead on the railway track five miles out, where he had been run over by a train. The court denied defendant's contention that deceased's death was not the proximate result of the depot master's negligence in allowing him to leave in such a state, saying it was not necessary to foresee the particular injury that actually resulted. The court's conclusion was correct, but its discussion related to a problem not involved. The whole inquiry here should have been directed to the point whether such a hazard as this fell within the scope of the rule of law which obligated defendant to take care of deceased. The judge's problem was to survey the limits of the rule and decide whether it comprehended protection to the interest here jeopardized. Whether it was jeopardized in this case to such an extent as to constitute defendant a wrongdoer was for the jury to find by an application of the usual formula. That such wrong, if found, was an appreciable factor in the result, under the facts given, presented no issue at all.

In the celebrated case of *Gilman v. Noyes*,⁴⁶ defendant left down the bars to plaintiff's close and the latter's sheep

⁴⁵ 67 Kan. 515, 73 P. 105 (1903).

⁴⁶ 57 N. H. 627 (1876).

escaped. They were killed by bears. Was defendant liable for the loss?

If the letting down of the bars was an appreciable factor in the loss of the sheep—and it would seem so beyond any doubt—there was no cause problem in the case.

If by leaving down the bars it was reasonably probable that plaintiff's property interest—his sheep in this instance—would be harmed, whether from the risk of bears or what not, the defendant would be a wrongdoer. No doubt this problem would ordinarily be for the jury as it is conceivable under possible states of fact that injury would not be probable. Its verdict would always be final on this issue.

There is only one other inquiry to make. Was this hazard of loss by bears a risk within the scope of the rule the violation of which made defendant a wrongdoer? This was a problem for the court and preliminary to all others. Suppose a thief finding the sheep straying had taken them up or a storm had arisen and they had been drowned or killed by lightning? The problem would be the same. It is not one of causal connection. It is one of determining the reach or scope of the rule invoked by plaintiff. Ladd, J., sensed the problem in saying: "The only question left open is whether the damage is within or without the line drawn by the law as the boundary between those injuries for which the law compels compensation to be made and those for which it does not." Instead of a *damage* problem as he conceived it to be, it is one of

surveying the bounds of the rule itself; a much larger problem.⁴⁷

In *Derry v. Flitner*,⁴⁸ plaintiff who was building a sea wall for Boston Gas Light Co. had the exclusive right to shelter his vessels behind the wall in case of storms. On the night of the storm in question defendant had completely occupied the only available space behind the wall with his own vessels. Plaintiff's vessels were left out in the open sea and two of them were sunk. Had defendant not occupied the shelter, plaintiff's vessels would have been protected from the storm. The sole problem here was whether plaintiff's interests were within the protection of the rule which defendant violated. If so, defendant's violation of the rule is clear. Causal connection offers no difficulty. The court having held the risk one which was protected against by the rule invoked, liability undoubtedly followed.⁴⁹

In the muchly quoted and cited case of *Lane v. Atlantic Works*,⁵⁰ defendant had left a truck loaded with iron in the streets. The iron was so placed that it would roll off

⁴⁷ A striking illustration of this problem is found in *Kelsey v. Rebuzzini* (Conn. 1913) 89 A. 170.

⁴⁸ 118 Mass. 131 (1875).

⁴⁹ *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101; *Burk v. Creamery Package Mfg. Co.*, 126 Iowa, 730, 102 N. W. 793, 106 Am. St. Rep. 377; *Bell v. Rocheford*, 78 Neb. 310, 110 N. W. 646, 126 Am. St. Rep. 595, are subject to the same analysis. A great mass of the so-called "intervening agency" cases are taken care of in the same fashion.

⁵⁰ 111 Mass. 136 (1872).

easily. Plaintiff, a seven year old boy, was standing by watching an older boy try to move the truck by means of its tongue; the iron rolled off and hurt plaintiff. The court turned the case on a problem of causal relation which was in no way involved. The plaintiff seemingly relied on an ordinance which prohibited the leaving of vehicles in the street unattended. Whether this was the basis of the suit or whether it rested on the larger basis of negligence in view of the probability of harm to persons in the street, the only troublesome point was whether a hazard of this character was within the radius of the rule involved. If so, negligence, damage and causal relation were easily made out.⁵¹

In *Chaddock v. Plummer*,⁵² defendant bought his nine year old boy an air gun. A neighbor's boy came onto defendant's premises after his son had gone to school and, seeing the gun, asked defendant's wife for some ammunition which she furnished. The neighbor boy shot the gun and the shot glanced and struck plaintiff's eye, putting it out. In a suit against defendant the court in effect held there was no negligence. The court said if the injury had been done by defendant's boy, the question would be different. If there was no negligence in buying the gun and putting it in the hands of his son, all else is immaterial. But if there had been negligence, the further question would have arisen whether such a risk as here shown

⁵¹ *Binford v. Johnson*, 82 Ind. 426, is soluble by a similar analysis.

⁵² 88 Mich. 225, 50 N. W. 135, 14 L. R. A. 675, 26 Am. St. Rep. 283 (1891).

would have fallen within the boundaries of the rule which made the defendant's conduct negligent. Only upon this hypothesis could there have been any difference between the issues whether the gun was in the hands of defendant's son or a neighbor boy. There was not the slightest issue of causation involved.

Pittsburg Reduction Co. v. Horton,⁵³ is a most interesting case and well illustrates how the cause problem can be made to do service when it is not involved. Defendant's foreman had thrown away some dynamite caps which he believed to be empty. A ten year old boy had picked them up as playthings, not knowing what they were, and had played with them around the house for some days. His father was a miner, and his mother had picked up the caps several times and laid them away but did not know what they contained. The boy took the caps to school and traded them to plaintiff, a thirteen year old schoolmate. Not knowing what the caps were, this boy while picking the dirt out of one of them caused it to explode and he was seriously injured. The court said: "Her (speaking of the finder's mother) course of conduct broke the causal connection between the original negligent act of appellant and the subsequent injury of the plaintiff." This was a complete misconception of the problem.⁵⁴

The important issue was whether this was a hazard within the bounds of the rule invoked. Was plaintiff's interest within the protection of this rule which required

⁵³ 87 Ark. 576, 113 S. W. 647, 18 L. R. A. (N. S.) 905 (1908).

⁵⁴ See Butrick v. Snyder (Mich.) 210 N. W. 311 (1926); *Town of Depew v. Kilgore*, 246 P. 606 (Okl. 1926).

defendant to take care? This was a problem which required a consideration by the judge of all the factors involved and it is conceivable that by looking at it in this light a contrary conclusion might have been reached. It requires a process of mental legerdemain to convert this problem into one of causal connection. Had the court permitted the issue of negligence to go to the jury, doubtless it would have been found favorably to plaintiff, but it would have been within the jury's province to have found either way.⁵⁵

In *Harrison v. Berkely*,⁵⁶ defendant sold plaintiff's slave intoxicating liquor, which the slave drank to excess and which, together with exposure, caused his death. A statute prohibited the sale of intoxicating liquor to slaves. Taking this as the foundation of the action, the whole question was whether the interest of the plaintiff was protected by the statute. Was the risk one within its purview? This was a matter for the court. If the case should be considered as founded on negligence, the problem would be the same. But, assuming the interest protected by defendant's duty to act reasonably, it would be the jury's function to find whether this interest was unreasonably jeopardized by defendant's conduct in this instance. This would call for an application of the "probability of harm" formula. There was no issue of causal connection and the court's discussion of this question was unnecessary.

⁵⁵ *Olson v. Gill Inv. Co.*, 58 Wash. 151, 108 P. 140, 27 L. R. A. (N. S.) 884 (1910), is an apt case for such analysis.

⁵⁶ (S. C.) 1 Strob. 525 (1847).

Graves v. Johnson⁵⁷ illustrates this point from a different angle. Plaintiff sold defendant intoxicating liquor, surmising correctly that defendant intended to resell the liquor in Maine unlawfully. Plaintiff sued for the purchase price, and the defense was the illegal purpose of the contract. Although plaintiff's knowledge made him anticipate the unlawful act, and his conduct was a factor in the illegal sale, yet recovery was permitted. The "illegal purpose of the contract" as a defense was not satisfied by this sort of conduct on plaintiff's part.

In Miloston v. Chicago,⁵⁸ the city had permitted an opening or areaway of considerable dimensions to remain in a sidewalk which ran along beside a building. A companion of plaintiff who was walking with him along the walk grabbed plaintiff and shoved him into the hole, resulting in serious injuries to plaintiff. The court held the city not liable for lack of proximate cause. It is possible perhaps to make a cause issue under the facts by considering the part played by the city's negligence with that of the companion who shoved plaintiff into the hole. It is possible to say the city's fault played no appreciable part in the result. But it is much clearer, equally decisive, and perhaps more rational to consider that the hazard here involved did not fall within the protection of the rule violated by the city. If, on the other hand, plaintiff had been passing in the dark and had stumbled into the hole, such would have been a hazard within the rule. When the rule

⁵⁷ 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355 (1901).

⁵⁸ 148 Ill. App. 540 (1909).

has been bounded, the cause issue disappears in cases of this character.⁵⁹

In *Henderson v. Dade Coal Co.*,⁶⁰ defendant, lessee of certain convicts, allowed one of them, who was alleged to have been known to be a vicious, immoral, brutal, sexually passionate man, to go about at large and that as a result of such unrestrained liberty he committed rape upon plaintiff. The court denied recovery on the ground of lack of proximate cause. This was not the problem. Whether such a hazard as this was within the bounds of the rule which defendant violated, assuming such violation, was the issue involved. Plaintiff's interest was afforded no protection against this risk under the rule invoked, i. e., negligence on the part of the defendant. The court may or may not have correctly bounded the scope of this rule as a result of its decision, but that its problem was not one of causal connection is apparent.

Contrast *Austin W. Jones Co. v. State*,⁶¹ in which plaintiff was permitted to recover for the loss of his property to which a discharged lunatic had set fire. The superintendent of the asylum hospital was found to have negligently discharged such patient. There was no difficulty as to the lunatic's setting the fire. But this and the negligence of the superintendent were for the jury. But was the lunatic's conduct in setting fire to plaintiff's property a risk within the range of the rule which the superintendent

⁵⁹ See *Alexander v. New Castle*, 115 Ind. 91; *Miller v. Bahmmuller*, 124 App. Div. 558, 108 N. Y. S. 924.

⁶⁰ 100 Ga. 568, 28 S. E. 251, 40 L. R. A. 95 (1897).

⁶¹ 122 Me. 214, 119 A. 577 (1923).

violated? This was the basic question, just as it was in the preceding case. The Maine court found no trouble with causal connection.

In *Andrews v. Kinsel*,⁶² defendant, who was the landlord of plaintiffs, storekeepers, entered upon adjoining premises, also belonging to defendant, to make repairs. The partition between the two buildings was removed during the course of the work and plaintiffs' goods exposed. At night defendant did not close the windows of the building being repaired. Burglars entered and took a large quantity of plaintiff's goods. Recovery was denied on the theory that defendant's negligence was not the "proximate cause" of the loss, the independent act of a third party having intervened. The court blundered. The issue was not one of causation; that was too clear. The only problem was whether the hazard was one protected against by the rule invoked. That defendant was negligent can no doubt be safely assumed, and such contributed appreciably to the loss. But was the duty resting upon defendant to close the windows of the building under repair designed to protect plaintiff against loss by theft? Looking at the problem in this light, the conclusion reached by the court is, to be mild about it, lacking in good sense.

In *Glasscock v. First National Bank of San Angelo*,⁶³ plaintiff, a depositor of defendant, drew a check in lead pencil for \$5.00 payable to one Rose, leaving blanks unfilled. Rose erased the amount and inserted figures and

⁶² 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25 (1901).

⁶³ 114 Tex. 207, 266 S. W. 393 (1924).

letters raising the check to \$500, which defendant paid and charged against plaintiff's account. Plaintiff sought to recover the amount in excess of the check as delivered. The defense was contributory negligence. The jury found this issue against plaintiff, and the court denied recovery. On review, the supreme court held the judgment erroneous and that the loss must fall on the bank inasmuch as plaintiff's negligence was not a proximate cause of the loss, the unlawful, intervening act of alteration by Rose not being foreseeable. The issue of causation was not involved, as plaintiff's delivery of such an instrument was clearly a contributing factor to the result. Assuming negligence as found by the jury, the only question was whether the alteration of the check (a criminal act) by Rose is the sort of hazard which the rule invoked as a defense is designed to protect against. That it is such a hazard is scarcely debatable. The real issue in the case was whether plaintiff was negligent under the facts of this particular case. That was submitted to the jury and found against her. It should have been decisive.

Defendants by unskillful navigation ran their ship upon a shoal, thereby losing all control of it and it was driven by the tide and wind upon the shore against plaintiff's wall, causing it to be damaged.⁶⁴ Kelly, C. B., said: "The question in this case is, whether the injury to the plaintiff's wall was *so caused* by the negligence of the defendants as to make the defendants liable within the rule of law applicable to such cases."

⁶⁴ The Lords Bailiff-Jurats of Romney Marsh v. The Corporation of Trinity House, L. R. 5 Exch. 204 (1870).

His discussion would indicate that the cause factor was the determinative one. It was not. The factors were many. The problem was one of defining the limits of the rule relied upon in order to determine whether this hazard fell within such limits. Was plaintiffs' interest protected by the rule invoked? This was a problem not of cause, but of policy, justice, weighing of interests. It was incorrectly stated unless the term "so caused" be made to include vastly more than appreciable causal connection between the wrong and injury. The courts constantly attempt to employ cause terminology in this fashion.

In the type of case in which plaintiff has been hurt physically by the conduct of defendant but on account of mistreatment or mistake by a physician, nurse or some act of plaintiff himself, the injuries resulted more seriously than they would have if they had been given proper treatment, the problem has been dealt with as turning on causal connection.⁶⁵ In most such cases there is normally no cause problem. The situation may be a complex one, however, involving several problems.

By assuming that defendant was a wrongdoer in the first instance, one of the problems is eliminated as it is of no moment whether he was a negligent or intentional wrongdoer. By assuming further that plaintiff does nothing either negligently or intentionally to cause further hurt, but that some third person, doctor, nurse, wife or stranger, does some act which combined with that of de-

⁶⁵ Pullman Palace Car Co. v. Bluhm, 109 Ill. 20; Sauter v. N. Y. C. & H. R. Ry. Co., 66 N. Y. 50; Thompson v. L. & N. Ry. Co., 91 Ala. 496, 8 So. 406.

fendant's produces more serious results than would otherwise have followed, we have a neat problem. But it is not one of cause. It is one of defining the limits of the protection of the rule which defendant has violated. Is protection given the injured interest against the hazard in question? This cannot be answered by considering the cause factor *alone*. On the contrary, the court must consider *all* the factors and interests involved as it does in exercising this function in other cases. The mistakes and errors made in the treatment of the hurt by physicians, surgeons, nurses, members of the family, are usually held to fall within the rule. Protection is afforded against such hazards. The court might conceivably hold, however, that not every such hazard falls within the protection of the particular rule.⁶⁶ But this problem is distinctly that of the court. No doubt the fact that it is inevitable that plaintiff will be exposed to such hazards has great weight in influencing the courts to extend protection against the most usual of them. But suppose that instead of maltreatment, a visitor, or even the physician communicates to plaintiff some disease, as scarlet fever, influenza, or the like? Or suppose that a stranger assaults plaintiff and re-opens the wounds or the like? Are these hazards which will be held to be protected against by the rule violated by defendant? The courts have held not.⁶⁷ Of course if the original hurt be a fatal one it is immaterial that additional hurt was

⁶⁶ See *Purchase v. Seelye*, 231 Mass. 434, 121 N. E. 413, 8 A. L. R. 503.

⁶⁷ *Bush v. Commonwealth*, 78 Ky. 268; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20.

caused by a hazard not protected against.⁶⁸ It is only in the event that the additional hazard is not one protected against and is one which produced the more serious results that any question of causation can arise. But in such instances the inquiry, in absence of such a plain case that there cannot be two reasonable opinions about it, is a pure question of fact for the jury. No abstract formula is necessary for its determination.⁶⁹

If the injured party has by his own wrongful conduct caused additional hurt (an invocation of the avoidable consequence rule) as by selecting an incompetent physician or engaging in a hazardous undertaking, or by committing suicide, recovery is denied for the additional hurt. These are hazards against which the rule violated provides no protection. The party himself is a wrongdoer. Of course, if in this class of cases the injuries inflicted by defendant are fatal of themselves, anything the injured party did would be immaterial although the result might be accelerated. The defendant's act would have appreciably contributed to the result.⁷⁰ Here, also, a true cause problem would arise. The point to be emphasized in this type of case is that the court's problem of bounding the rule violated—determining the protection given the injured interest—is the important one and the hard one to solve.

⁶⁸ *People v. Lewis*, 124 Cal. 551, 57 P. 470, 45 L. R. A. 783; *Thompson v. L. & N. Ry.*, 91 Ala. 496, 8 So. 406.

⁶⁹ See *Schafer v. Vamey* (Wis.) 210 N. W. 359 (1926) as indicating how problem is dealt with under Workmen's Compensation Law.

⁷⁰ *People v. Lewis*, *supra*.

In *Stone v. Boston & Albany Ry. Co.*,⁷¹ plaintiff's lumber yards and manufacturing business, located across the street and about seventy-five feet from defendant's freight depot, were destroyed by fire originating on defendant's depot premises. It appears that defendant had employed a platform near plaintiff's premises as an unloading place for oil and that by reason of the leakage the platform and ground beneath had become soaked with oil. A teamster about the platform on business purposes lighted his pipe and threw the match on the ground beneath and the fire sprang up with the results indicated. The court assumed that defendant was negligent, but denied recovery for lack of "proximate cause." This was a false issue, as the cause factors were obvious. The result of the decision was to hold that plaintiff's property interest was not protected by the rule invoked against the hazard created through defendant's conduct. The court thus denied the jury the opportunity to find whether in this particular case defendant was a wrongdoer. But it is remarkable that the court employed the "probability of harm" formula as a test in determining its own problem. In this the court erred, for the jury's formula, although a broad one, is entirely too narrow for measuring the problem before the court. It would seem that the court erred in solving its problem and that the case rightfully belonged to the jury on the issue of negligence.⁷²

In *Doss v. Town of Big Stone Gap*,⁷³ plaintiff sought to

⁷¹ 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794 (1898).

⁷² *Bellino v. Columbus Const. Co.*, 188 Mass. 430, 74 N. E. 684, may be treated in a similar manner.

⁷³ (Va.) 134 S. E. 563 (1926).

recover of defendant for the death of her intestate on account of his being struck by an aeroplane. Plaintiff alleged that the town had allowed a main thoroughfare to become so out of repair that deceased was compelled to use a detour which the town had provided for persons desiring to reach a public park, and that by virtue of aeroplanes using a part of such park for landing purposes such detour was dangerous for travellers thereon. In affirming the judgment of the trial court sustaining a demurrer to plaintiff's petition, the court assumed defendant's negligence (which was doubtful) and based its holding on the absence of proximate cause. It is conceivable that causal connection may not have been an issue, but such was not so clear as to warrant the court to take it from the jury. The larger and decisive question (assuming both negligence and causal connection) was whether the rule violated by defendant in allowing the street to become impassable and in locating a detour as it did, was designed to give protection against this sort of hazard. It would doubtless be generally conceded that to extend the protection of the obligation owed under the law by the town to travellers, in providing reasonably safe streets, to such hazards as here involved would be going too far. But such conclusion would not rest on an absence of causal connection between the breach of duty and the injury, but upon consideration of all those factors necessarily implied in determining a sound public policy.⁷⁴

⁷⁴ The Court had the same problem in *Allison v. City of Fredericksburg*, 112 Va. 243, 71 S. E. 525, 48 L. R. A. (N. S.) 93.

In *Mutz v. City of Akron*,⁷⁵ plaintiff sued the city for injuries received while rescuing his horse from a ditch which defendant had dug in the street and left in a dangerous and unprotected condition with respect to those using the city streets. Plaintiff was holding the head of the horse as it was being lifted from the ditch, when the horse lunged and upset the derrick being used in extricating him, causing a four inch pipe to fall and strike plaintiff's jaw. The negligence of the city was clear. But the court considered the causal connection between the city's negligence and plaintiff's injury as the doubtful question and held it was for the jury to determine. Causal connection was as clear as the negligence itself. The only problem that offered any difficulty was whether this sort of hazard (the injury received in rescuing the horse) was within the scope, range, protection of the rule of law which plaintiff relied on for recovery and which defendant had violated. This was the judge's problem, and one for much profounder consideration than that merely of causal connection. From the facts as alleged seemingly there was no issue for the *jury* save that of ascertaining the damages. The issues of negligence and causal relation seem too clear for reasonable doubt, hence were resolvable as undisputed

There a child fell through a hole in a bridge bruising her knee. Cancer developed. Both negligence and physical causation were conceded, but recovery was denied because injury not "proximate." Cancer, in the court's mind, was simply not a hazard which the rule, requiring the town to keep its bridge in repair, was designed to protect against. Perhaps blood poisoning requiring the leg to have been amputated would have been considered otherwise.

⁷⁵ (Ohio) 153 N. E. 868 (1926).

issues. But whether the city's obligation under the rule violated should include such hazard as plaintiff encountered brought the court's law defining function into play. It was a blunder to hold such to be for the jury.⁷⁶

In *Hadley v. Scott*,⁷⁷ the plaintiff, nearing a street intersection in her automobile, heard the approach of a fire truck. In obedience to a city ordinance, she immediately parked her car parallel to the right-hand curb, to clear the street. The defendant's coal truck, coming at right angles to the fire engine, was negligently driven past the street line and stopped at the center of the intersection. The driver of the oncoming truck, realizing that a collision was imminent, swerved suddenly to the right, to avoid hitting the coal truck and crashed into the plaintiff's car.⁷⁸ The court erroneously left the fact of causation to the jury. It was undisputed. The question of defendant's negligence was clearly an issue for the jury under the evidence. But assuming negligence, was the risk of causing a crash with a third party a hazard which defendant incurred when he negligently drove his truck into the center of the street instead of stopping as the ordinance required? This was a question for the court and it would seem beyond cavil that the rule which was violated was for the very purpose of clearing the streets for fire engines so as to prevent this sort of crash. The case offers no difficulty and no intricate formulas should be required to work its solution.

⁷⁶ *Page v. Bucksport* (1874) 64 Me. 51, 18 Am. Rep. 23.

⁷⁷ 241 P. 26 (Wash. 1925).

⁷⁸ See 74 U. of Pa. Law Rev. 485.

Courts abandon their functions when such questions are left to a jury under any guise.⁷⁹

In *Migliaccio v. Public Service R. Co.*,⁸⁰ plaintiff sued for the wrongful death of her husband, claiming that as a result of a collision with defendant's car, decedent was severely injured and as a result he contracted tuberculosis from which he died. It appeared that deceased recovered from the injuries received and went to work for an undertaking establishment and that he indicated no symptoms of tuberculosis until more than a year after his injury. Plaintiff sought to show causal connection by the testimony of physicians that tuberculosis is caused by germ infection and that it was reasonably probable that the accident lowered decedent's vitality to such an extent that he became infected with the tuberculosis germ which developed so as to cause his death. No doubt the plaintiff thought the issue as easy here as in workmen compensation cases. The court in holding that a verdict should have been directed for defendant said:

"The question of proximate cause in negligence cases presents as delicate a question as exists in the law.
* * * It is necessary for plaintiff * * * to prove that the defendant did an act or omitted to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury complained of and that such act did actually cause the injury. * * *
Anticipation is an essential element of proximate cause.

⁷⁹ See interesting case of *Holmsburg v. Villhouse*, 158 Minn. 442, 197 N. W. 849 (1924), in which the problem is the same.

⁸⁰ (N. J.) 130 A. 9 (1925).

* * * It is incumbent upon the plaintiff to exclude the idea that death was due to a cause with which the defendant was unconnected. * * * *In the present case we see no testimony which establishes a causal connection between the injury and death."*

No doubt tuberculosis is a hazard which is protected against by the rules which are designed to give protection to the interest of bodily safety. In this case plaintiff made an issue of negligence. If there was an issue of causal connection made by the evidence the case was for the jury. But this was the weak point in the case and under the evidence as adduced on the trial no doubt the court was correct in saying there was no evidence on this issue to form the basis of a reasonable inference. But the court, instead of being satisfied with the exercise of this rightful function of terminating the case on the lack of evidence, undertook to lay down *legal rules* for the determination of causal connection, which is always a question of fact. The *failure* of plaintiff to *prove* causal connection and the *existence* of such relation between decedent's injury and death were two entirely distinct problems. The court's function only had to do with the first.⁸¹

In Towaliger Falls Power Co. v. Sims,⁸² plaintiff alleged that defendant built a dam, causing a large body of water to be impounded near plaintiff's home, and that an unhealthful condition was created, mosquitoes were

⁸¹ Compare: Tullgren v. Amoskeag Mfg. Co. (N. H.) 133 A. 4; Bishop v. St. Paul City Ry. Co., 48 Minn. 26, 50 N. W. 927; Western Union Tel. Co. v. Preston, 254 F. 229.

⁸² 6 Ga. App. 749, 65 S. E. 844 (1909).

caused to breed and malaria transmitted to himself and the members of his family, resulting in illness, suffering, great expense, and loss of services. The defense was that these losses were too remote. The court held otherwise. But the issue was not one of remoteness. It was whether plaintiff's interest in his bodily welfare and that of his family were within the protection of the rule invoked. Should the scope of defendant's unreasonable conduct be held to include these hazards? This was the court's problem and could only be solved after a survey of all the factors and interests involved. It is true causal connection was one of these factors but by no means a decisive one.

In *South Side Passenger Ry. Co. v. Trich*,⁸³ plaintiff was boarding a street car when the driver started it in motion. As the car reached the middle of an intersecting street the driver whipped up his team suddenly to avoid a collision with a runaway horse and carriage. This sudden motion threw plaintiff from the platform into the street and she was instantly struck by the runaway. The appellate court reversed a judgment in her favor on the ground that there was no "proximate" causation; the injury not having been caused by the driver's conduct but by the runaway. This was an utter perversion of any normal meaning of causal relation. This was not the problem involved. The plaintiff relied on negligence, the unreasonableness of the driver's conduct, as a basis of recovery. Perhaps this itself was an issue for the jury. But conceding negligence, the court's problem was to determine

⁸³ 117 Pa. 390, 11 A. 627, 2 Am. St. Rep. 672 (1887).

whether a hazard of this sort fell within the scope of the rule which defendant had violated. Was her interest protected against such a risk? The court might have reached the same conclusion had it conceived the case in this light, but its consideration of the problem would no doubt have been simplified and its discussion more rational. It is possible also that the larger issue might have influenced it to reach a contrary conclusion, thus leaving it to the jury to find whether in this particular case there was in fact unreasonable conduct on the driver's part. In *Washington & Georgetown Ry. Co. v. Hickey*,⁸⁴ the same problem was involved, and the court solved it favorably to the plaintiff. Upon submission to the jury defendant was found negligent and plaintiff recovered.

In *Bentley v. Fisher Lumber & Mfg. Co.*,⁸⁵ defendant erected a levee which obstructed a natural drainage outlet for lands belonging to others beside the plaintiff. These third parties becoming discontented cut the levee and allowed the impounded water to escape on plaintiff's cultivated lands below, causing damage to her crop. The court denied plaintiff recovery for lack of "proximate" cause. This was a false issue. The court faced the problem of determining whether this was a hazard protected against by the rule which plaintiff relied on for recovery. The *result* of the decision was to hold that such hazard was outside the scope of the rule, and that was the decisive point of the case.

⁸⁴ 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101 (1897).

⁸⁵ 51 La. Ann. 451, 25 So. 262 (1890).

In *City of Louisville v. Hart*,⁸⁶ recovery was sought for the death of deceased caused by his being thrown in front of a moving street car from a wagon which he was driving. The negligence of the city in failing to keep the street in a reasonably safe condition for public travel was the ground relied on for recovery. The whole problem for the court was whether the hazard which deceased incurred fell within the scope of the rule invoked. The court held that it did and upon submission of the case to the jury it was found by them that the city was a negligent wrongdoer. The court treated its problem as one of causation and reached a correct result by holding that both the conduct of the city and street car company were "proximate" causes of the injury. Of course they were, but that was not the problem. This is merely an instance of the court's having reached a right conclusion by an erroneous process. It translated what frequently is a very difficult problem into terms which are wholly meaningless except for such meaning as may be given them in the particular case.⁸⁷

In *Cole v. German Savings & Loan Society*,⁸⁸ plaintiff sought to recover against defendant for injuries she suffered by having fallen into an elevator shaft in defendant's building. It appeared that as plaintiff entered the building for the purpose of using the elevator a small boy opened

⁸⁶ 143 Ky. 171, 136 S. W. 212, 35 L. R. A. (N. S.) 207 (1911).

⁸⁷ *Watson v. Kentucky & Ind. Ry. Co.*, 137 Ky. 619, 126 S. W. 146, 129 S. W. 341 (1910), is a remarkable illustration of the same problem, presenting a contrast between a hazard resulting from negligent and intentional conduct by a third person.

⁸⁸ (C. C. A.) 124 F. 116 (1903).

the door to the elevator and plaintiff walked into the shaft. The hall was dark and gloomy and it was difficult to see the elevator at the lower floor. The plaintiff thought the boy was the operator of the elevator and that he was opening the door for her to enter it. The court held there was no "proximate" cause and denied recovery. The opinion of the court assumes negligence on the part of defendant. The error here made by the court is a most usual one and the numerous opinions of this character are distressingly confusing. The court's preliminary problem was simple: Did the rule which defendant was alleged to have violated afford protection to plaintiff's injured interest against this sort of hazard? The factor of causal relation was one among many which the court should have considered in passing on this question, but it was not determinative. That it was present is too apparent. But whether defendant should be held for injuries that might flow from such a hazard presents substantial difficulties. Even had the court decided this problem favorably to plaintiff, the jury would then have been faced with finding that defendant was negligent in this instance before plaintiff could have recovered. The court converted *its* problem of law into a factual one of cause and then declared that there was no evidence on which it could go to the jury. The result may be justifiable, but the process is a plague to legal science.⁸⁹

⁸⁹ The following are recent cases in which the issue of negligence and causal relation were either obvious or at least questions for the jury, but in which the court's large problem was to determine whether the rule violated by defendant gave protection against the hazard which plaintiff had encountered. In every case this latter

The *Polemis Case* * is deserving of extended treatment. The court having determined that liability for destruction problem was confused with the problem of causal connection.

Baltimore & Ohio R. Co. v. Ranier (Ind. 1925) 149 N. E. 361; *Moran v. Paledor* (Ind. 1926) 151 N. E. 140; *Atlantic Coast Line R. Co. v. Wheeler* (Va. 1925) 132 S. E. 517; *Etheridge v. Norfolk Southern R. Co.* (Va. 1924) 129 S. E. 680; *Appalachian Power Co. v. Wilson* (Va. 1924) 129 S. E. 277 (a remarkable case); *Stroud v. Chicago, etc., Ry. Co.* (Mont. 1926) 243 P. 1089. Plaintiff hurt by collision with negligently operated train at crossing covered with ice on account of which plaintiff's car could not be stopped in time. But causal connection was too clear for doubt. *Rollow v. Ogden City* (Utah, 1926) 343 P. 791; *Speight v. Simonsen* (Or. 1925) 239 P. 542; *Voshall v. Northern Pac. Ter. Co.* (Or. 1925) 240 P. 891; *Carroll v. Central Counties Gas Co.* (Cal. 1925) 240 P. 53; *Hartford All Night and Day Bank*, 150 P. 356, 170 Cal. 538, L. R. A. 1916A, 1220; *Waggoner v. Bank of Bernie* (Mo. App. 1926) 281 S. W. 130; *F. W. & D. C. Ry. Co. v. Westrup* (Tex. Com. App. 1926) 285 S. W. 1053; *George v. K. C. S. Ry. Co.* (Mo. App. 1926) 286 S. W. 130. Truck stalled on crossing was struck by freight car which broke loose from train on account of failure to provide safe and sufficient couplings. Causal relation very clear. *McEvelly v. L. E. Myers Co.* (Ky. 1925) 276 S. W. 1068; *F. W. & D. C. Ry. Co. v. Williams* (Tex. Civ. App. 1925) 275 S. W. 415; *Kentucky Independent Oil Co. v. Schnitzler* (Ky. 1925) 271 S. W. 570; *Oehler v. Bamberger & Co.* (N. J. 1926) 135 A. 71. (This case almost states in so many words the contention of the author.) *Stemmler v. City of Pittsburgh* (Pa. 1926) 135 A. 100; *Clifford v. Metropolitan L. Ins. Co.*, 197 Ky. 828, 248 S. W. 180, 32 A. L. R. 919.

Orton v. Penn. R. Co., 7 F.(2d) 36 (1925) typifies a favorite error on the part of courts. Plaintiff's contributory negligence in running into a train negligently on the crossing was converted into

* In re *Polemis v. Furness, Withy & Co.*, [1921] 3 K. B. 560, 90 L. J. K. B. 135. The facts have already been given, supra, p. 49.

by fire was not excepted by the contract, plaintiffs' property interest (the ship) was protected, if at all, by the ordinary rules of law. Plaintiffs contended in effect that defendants were negligent towards plaintiffs' interest (the ship) in permitting a plank to fall in the hold of the ship. The whole ship was destroyed by virtue of the plank's having by contact with some object caused a spark which ignited fumes collected in the hold from leaks in the benzine cargo. Thus the court's first function, after holding that the interest was protected (i. e., not excepted by the contract), was to say whether this peril fell within the protection afforded by the rule (requiring reasonable care in unloading the ship) alleged to have been violated. Clearly this was the court's function exclusively. Its exercise was clearly antecedent to any functions that a jury might have been called to perform. The questions of fact were not touched by it: (1) Were defendants negligent; i. e., was the rule of law relied upon by plaintiffs violated? (2) Did such violation appreciably contribute to the result? And (3) what were the losses valued in terms of money? These were all secondary, and here of no great difficulty.

The court's problem was a severe one. Where were the limits of protection afforded plaintiffs by the rule violated to be drawn? Against what sort of hazards did the a problem of proximate causation. This sort of error is unparadonable.

See *Shafer v. Keeley Ice Cream Co.* (Utah, 1925) 234 P. 300, 38 A. L. R. 1523. Whether throwing confections from float into street so that boys scrambling for packages knocked plaintiff down causing her injuries is (1) negligent, (2) the proximate cause of her injuries. Case is handled very intelligently.

rule protect? Suppose the plank had punctured the ship's hull, so that it was caused to sink quickly? Suppose the plank had punctured the ship's reserve oil tank, causing fumes to be brought into contact with a workman, who was just lighting a cigarette? Suppose the plank had fallen on a shipment of nitroglycerine or other explosive, setting it off? Suppose the plank had dislodged some heavier article, which brought about any of these consequences? Suppose, instead of striking a spark from some object with which it had come in contact, that it had burst an electric light globe or caused a short circuit to be brought into contact with the gas vapors?

In all these cases the court would have had exactly the same problem. Was the rule violated designed to protect against these hazards, and especially the one producing the loss? The problem involves many factors. No one factor would or should be made controlling. Foreseeability or experience as a factor clearly could be of little significance in such a case as this. The court seems to have made the *directness* of the result of controlling importance. This is unfortunate as a matter of legal science. Was the result direct? Might not it be said with equal assurance that the result was *consequential, indirect*? These terms are bankrupt. They have no place in such company, and it is believed that the court made use of them for lack of some better method of rationalizing a decision which had been reached.

I do not know that the court reached a desirable result. Perhaps as good arguments might be made for as against the decision. No one who is not in a position to take into

account all the factors involved is able to say whether the court committed error. There are many cases in whose solution there is no right and wrong. What is socially desirable? Which way will work the best? Who is ablest to pay or stand the loss? What do shipping interests generally demand as a rule in such cases? It is purely a problem of placing the risk. The only certain conclusion which can be drawn is that no formula, no single factor, can be relied upon to work a desirable solution in every such case. We have judges, human, frequently erring, who are supposed to bring all the intelligence and experience they can command to bear on such problems. We prefer their decision to that of tossing a dollar; but a decision contrary to that of any particular individual's or group's way of thinking is one of the risks we run in having judges decide disputes. The judges in this case may have given the rule too long a reach. But maybe not. What any one individual may think about it is beside the point. Trying it out will doubtless prove something. And if it appears that the rule has been extended too far, in a later case we may expect a recession. Let us hope that any modification which may be made in it will not involve the pronouncement of some hurtful formula. Such cases demand intelligence, and intelligence and formulas soon part company.

SECTION 5

SUMMARY

As shown by these cases, the courts have insisted upon converting all manner of problems into those of causation. The latter problem has been thereby emphasized far beyond its importance. Moreover, it has been made to serve such perverted uses until its meaning has been completely obscured. Only a sound sense of justice possessed by courts generally has enabled them to turn the issue, though a false one, to desirable ends in most of the cases. The no-man's-land of *remoteness* or *proximateness*—as the taste of the particular court requires—has proved an almost insuperable barrier to an attack upon the real issue involved in cases of this type. As has been repeatedly indicated, the inquiry in such cases is, what is the right or interest sought to be vindicated and is the rule invoked therefor designed to protect it? Determining whether a rule covers a loss is a wholly different process from that of seeking cause and effect, and one which is inescapable in any case, under whatever guise it may be considered. One is qualitative, the other quantitative. Neither can be translated into terms of the other, however persistently it may be attempted. One requires the judgment of the judge in *every* case, the other only when reasonable minds cannot differ about it.

If this analysis is correct, it must be clear that the courts have apparently thrown upon the jury the most difficult problem which can arise in litigation, that of determining whether the interest which is sought to be vindicated is

within the protection of the rule of law invoked. Stated differently, whether the risk which has befallen such interest is one against which the law affords protection. This accounts for the fact that in so many cases which have been submitted to the jury by trial courts the appellate courts have revised the verdicts and have appeared to deny to juries their proper functions. In doing this the courts have been in most part merely doing belatedly what should have been done at an earlier stage in the litigation and if so done would have saved consideration by a jury altogether. The method adopted by courts in dealing with this problem has thus not only been an obscure one, but it has been most wasteful of the court's time and most expensive both to litigant and state. Moreover, if this analysis is correct it indicates a most unbelievable blunder on the part of courts generally in conceiving the problem as one of causal relation, and a degree of servility to empty formula which is astounding.

It has undoubtedly been generally assumed that the difficulties involved in the types of cases as have been reviewed are difficulties of causation, and further that one lone formula, the "probability of harm," is the solvent in every case. Apparently it has not been widely appreciated that the judge has any function to perform save that of keeping the jury, in the application of this formula, within reasonable bounds. Courts have sought to exercise this function by saying, as a result of their own judgment, that the consequences were not "proximate" because not "foreseeable." Under the analysis here suggested, the judge's function is made far more important. It is made his duty

to declare or at least comprehend the law and its limits preliminarily to the consideration of its violation in the particular case. While the jury's inquiry in a negligence case may be restricted to what might have been reasonably anticipated by the defendant in the particular case as determining whether he has violated a rule of law, no such consideration can alone be depended upon for determining whether the rule relied on includes within its scope such conduct on the part of a defendant. In other words, before it can possibly be said that a defendant has violated a rule of law, it must first be determined by the judge whether there is any such rule which prohibits defendant's conduct. In most negligence cases the rules of law are not crystallized as in other wrongs, hence in every instance the judge must consciously or unconsciously decide that there is a rule of law forbidding the conduct alleged, and that plaintiff has invoked it, before any inquiry can become pertinent as to whether a defendant has in fact been guilty of such conduct. The two functions are thus entirely distinct, and it would be most remarkable indeed if two such distinct problems were soluble by the same formula. Nevertheless, the courts have insisted upon using the narrow formula of "probability of harm," the jury's test for determining the violation of a rule, as a test in determining whether there was in fact a rule to be violated. And they have insisted that the jury themselves make the determination.

The reason for this seeming abdication of the judge's high function in this class of cases is difficult to understand and is not the subject of a satisfactory explanation.

Perhaps it is due to the fact that some judges never fully appreciate this function. The judge no doubt feels that he is bound by rules which he cannot rise above and which he must enforce. This is true but it is true only in one sense for he (considering the judge as the judiciary) and he alone is given the power to declare the very rules which bind him and to say what conduct they encompass. He, then, in some way must declare these rules by which he is bound, and must further define their sphere. Naturally, he would like to be able to discover formulas for ascertaining these rules by which he must be bound much as he employs for instructing a jury to enable them to apply such rules. But the processes required for the two functions are wholly different. One, and the most important, is a process of discovering, interpreting, or making law; the other, the minor one, is a process of directing another agency how to make use of the law which has been discovered, interpreted or made. The latter can only be employed after the rules and their scope have been determined. The latter will submit to formularization, the former will not. The judge thus may feel a sort of helplessness or despair in exercising a function of this nature, for how is he to create something out of nothing? How shall he declare a rule and its scope without some guide or compass? Perhaps it is this inherent desire for some such aid that has moved judges generally to grasp the formula they submit to a jury as a guide for the determination of negligence as likewise a formula for guiding themselves in declaring a rule and its limits. Clinging to

this formula with deathlike grip they have made it a determinant of law itself, when it is designed merely for aid to a jury in determining the fact of wrongdoing in a particular case.

But if this formula cannot be employed by the judge in solving his problem, what can he employ? Is he left without guide? Is there nothing high nor low to which he can appeal? Must he play the rôle of creator? If so, has not his problem been made tremendously more complex? Does not the process while relieving the cause element of an unnatural burden, at the same time place an unbearable one on the judge?

It is true that by transferring the burden from one element in legal liability to another the solution of the problem is made none the easier except that it is made clearer and more graspable. The court is enabled to see it in its true light and thereby its importance is more easily recognized. Moreover, the judge can no longer be deluded into thinking that he is working a solution merely by shifting the problem to another agency in no way fitted to handle it. The result ought to be that judges can more intelligently appreciate their functions and thereby more certainly know what they are about. As creators (at least interpreters) of the law judges occupy the most responsible places in our governmental system and too great emphasis cannot be placed on their functions. The danger comes from minimization rather than from overemphasis.

But are judges in exercising this function without guide? Clearly not. Aside from precedents and analogies

which they have at their command, they may call to their aid every consideration that any other lawmaking body can invoke. They are aware of the conflicting and competing interests which demand the law's protection. They are acquainted with the habits and customs, the wants and desires, of the individuals and groups whose interests they are commissioned to protect. Their experience teaches them the range of human conduct and its effects. Their experience and understanding as individuals in society is their guide and based upon it they exercise their judgment as best they can. This must be the process of lawmaking and it is as certain and as much to be depended upon for the foundation of law as for the basis of other human institutions. The judge is bound by no narrow formula such as he employs to bind the jury which he instructs; the experience, the wisdom, the sense of an intelligent being, are his to use, and it is upon their use that the progress and the science of the law generally must rest.

NOTE.—It is generally felt, in spite of the constant reiteration that "proximate" cause is a question of fact, that there is some place in solving the problem, as it is usually conceived, for the judge to play some important part. But by reason of the unintelligible form in which the problem appears when conceived as one of causation, it has never been possible to isolate the judge's function from that of the jury's. Professor Beale expresses the idea in this way: " * * * The court, through some definite principle of law, should determine the general limits of proximity and not leave it at large to the jury."⁹⁰ He further adds: "It is the purpose

⁹⁰ The Proximate Consequences of an Act, 33 Harv. Law Rev. 633; Selected Essays on the Law of Torts, 733.

of this article to suggest certain more definite principles of law by which the determination of proximity is to be regulated." And further: "The rule that requires the exclusion of remote consequences is therefore a fundamental principle of law, based on the necessity of doing justice to all; and the question in any particular case, whether a given result is remote, is purely a question of law. • • • But the rule of law which is to be applied to the facts must always be found by the court and given by it to the jury. This question has proved a puzzling one to courts and lawyers."

Professor McLaughlin, in further elucidation of Professor Beale's views, says: "Now causation, as such, is a question of fact. Proximate causation is a question of law. The entire doctrine assumes that a defendant is not necessarily to be held responsible for all the consequences of his acts."⁹¹

Professor Beale's whole effort is directed towards supplying courts with definite rules for solving *their* problems in these cases. His error in the writer's opinion, is in attempting to apply rules of causation—quantitative determinants—to a problem calling for good judgment—the weighing of interests. In other words he misconceives the nature of the problem, although he realizes that it is one for the judge. He would have the judge do, with definite rules, what the jury should be called upon to do, if the problem were one of causal relation. It is believed that the analysis here offered presents the problem in its true light, and if this is correct, the difficulties which Professor Beale sought to meet are largely obviated, while at the same time the court's judgment is invoked as he would have it. But it is obvious that the rules worked out by him could perform no service to a court in solving such a problem as the writer conceives to be involved.

Professor Beale's theory has been recently subjected to criticism by Professor Edgerton.⁹² The latter suggests a formula of his own which he labels. "Justice As a Test." He says:

⁹¹ 39 Harv. Law Rev. 155.

⁹² 72 U. of Pa. Law Rev. 211, 343.

"A legal cause is a justly-attachable cause; (or) a legal consequence is a justly-attributable consequence; (or) a legal cause is a cause which stands in such a relation to its consequence that it is just to give legal effect to the relation; meaning by 'just' not merely fair as between the parties, but socially advantageous, as serving the most important of the competing individual and social interests involved."

This theory loads too much on the cause element. The factors discussed by Professor Edgerton are all relevant but in determining the scope of protection to be given an interest rather than causal relation. By this process the cause element as such is effectually blurred. Justice has little if anything in common with causal relation. Moreover, it is entirely too big an assignment to hand over to a jury. Justice is the end of the law; it is the end of the lawsuit. Surely it cannot be at the same time the test for reaching that end. It comprehends too much. It requires a lumping together of all the elements of the case and a judgment on the whole case. All the considerations named by Professor Edgerton, on the other hand, would be required of a judge in exercising the function indicated in the foregoing pages. This would likewise satisfy Professor Edgerton's demand that the judge be given wider latitude. His error is in supposing that the problem is one of causal relation for a jury.⁹³

Sir John Salmond,⁹⁴ under the heading of "Remoteness of Damages," fully appreciates the differences between the problem here considered and that of causation in fact. So far as causal connection is a problem, he seems to consider the *sine qua non* test sufficient. The problems here treated as the recognition of interests and the scope of their protection, he treats as one of "remoteness of damage." His attempts at formulating rules for determining remoteness are perhaps more successful than are to be else-

⁹³ See a summary of the several views 74 U. of Pa. Law Rev. 485.

⁹⁴ Salmond on Torts (6th Ed. 1924) p. 131.

where found, but at that amount to little, if anything, more than rules for taking care of various types of cases as they have usually been solved. His discussion is most rational, and I have found much support in it for the analysis suggested in these pages.

After the text of this book was written and ready for the publisher the writer in rechecking his source material again read Professor Bingham's two articles⁹⁵ and realized for the first time the kinship of the conclusions reached there and in this book. On further rechecking, the author found that he had not read these articles since preparing an article on another phase of the subject.⁹⁶ At that time the writer's views as to causation were uncertain, and were not fully matured until the summer of 1926 when the manuscript of this book was first drafted. The conclusions here arrived at were without conscious influence of Professor Bingham's views, yet no doubt the early reading of his articles played a considerable part in directing the writer towards the conclusions he has reached. The treatment of the subject would no doubt have been greatly strengthened by a serious consideration of these articles. To have had them to rely upon would have afforded the writer a satisfaction and an assurance which he has found in no other source.

Yet it would be too much to say that Professor Bingham's views support the writer's views entirely. They do not. Professor Bingham postulates that duties are concrete and that the problem is to define the concrete duty and its purposes and that generalizations are not to be had or to be relied upon. On the other hand the writer postulates interests and through them rights and requires principles and rules which protect such interests and rights, and states the problem as the defining of the limits of protection given by such rules. Also the author makes this process distinct from that of determining the violation of a particular rule, thus calling for

⁹⁵ 9 Col. Law Rev. 16, 136.

⁹⁶ 1 Tex. Law Rev. 243, 423.

a clear outlining of the functions of judge and jury. It may be that these differences are those of terminology as has already been suggested. But the articles referred to will have to be read in order for the differences to be fully appreciated. Notwithstanding any differences that there may be, the writer is glad to accord to Professor Bingham the recognition due him of having first directed attention to a rational method of attack against the myth of "proximate cause." Doubtless it will require the efforts of many others before we hear the last of it.

CHAPTER 5

THE PROBLEM OF CAUSAL RELATION

SECTION 1

GENERALLY

Causal relation is one of fact.¹ It is always for the jury, *except* when the facts are such that they will support only one reasonable inference. The courts as a matter of theory all agree thus far. The *exception* obtains in the great majority of cases, as the facts are so clear that no issue is raised as to causal relation. But strangely enough the courts insist on submitting the question to the jury in practically every case. Stranger still, the issue which the courts usually take for a causation issue is generally an issue of law, nevertheless, issue of law though it be, the jury is normally required to pass upon it under the guise of determining "proximate cause."

Causal relation is the universal factor common to all legal liability. On the other hand, the constituents of the other elements of legal liability change with every type of action. In assault they are different from what they are in deceit; in contract different from what they are in crime. They constitute the universal variants. But causation is as much an element in an accident as in battery; in a breach of contract as in murder. And it is exactly the same problem wherever found and is soluble by the same

¹ *Berglund v. Hild* (N. J. 1926) 135 A. 52; *Langevin v. Twin State Gas & Electric Co.* (N. H.) 128 A. 681 (1925).

process. It is only in the rarest instances that it offers any difficulty. It seldom gets to the surface. It is made difficult only because of the attempts to translate foreign problems into causation terms.

In coming out of a door, A bumps into B who is about to enter. Erysipelas sets up in B's cheek where the blow was received. If A neither intended the harm nor was negligent there is no liability. But there is causal relation in the same sense as though A were a wrongdoer.

Likewise, A, with the purpose of killing B, gives him a potion of what A thinks is poison. B dies but it turns out that the potion was altogether harmless and that B died of heart failure. There is a lack of causal relation here, and A is not guilty of homicide. Should A shoot at B and miss him, but at the same time B should be killed by a shot from C's gun, the situation would be the same.

Should A contract to carry B on Monday from Austin to Chicago by airplane in order that B might perform a particular service on Tuesday morning in Chicago and A should fail to perform his contract, there would be no doubt as to causal relation between the breach and B's loss. But should B on Monday have been so disabled as to have been unable to perform the service had he reached Chicago, there would have been no causal relation between the breach and B's loss.

The determination of causal relation in each case would be by the same process—an inquiry into the facts. If the fact data are such that it can be ascertained by the ordinary individual, we should say the issue was determinable by common sense. But if the data are such that experts

are required to ascertain it, then we should call the inquiry a scientific one. There is no difference in the process; some situations are merely more difficult to comprehend and unravel.

A point of equal importance to be observed is that in any given case the inquiry is not directed toward discovering *the* cause of the damage, but is whether the defendant's conduct was *a* cause of the damage. There are innumerable cause factors in every case.² There is no such thing as sole cause. The court is not set up as a scientific commission to ferret out all of these factors and apportion the respective shares of the losses to each. The court is only interested in determining what *part* the conduct of the *defendant* played in producing the results. Nor is it quite this. The court wants to know whether the defendant's conduct played *such* part as to make *him* responsible. The complainant himself has by allegations limited the inquiry to the conduct of the person charged. The consideration of other cause factors is incidental and only material on two points: *First*, whether the part played by any other cause factor is a hazard for which *defendant* should be held; and, *second*, whether in the light of all the other factors, the defendant's conduct played an *appreciable* part in the result. It will be noted that the first point gives rise

² "He whose negligence joins with the act of God in producing injury is liable therefor"—*Kindell v. Franklin Sugar Refining Co.* (Pa.) 133 A. 566 (1926). See, also, *Town of Bennington v. Fillmore* (Vt.) 130 A. 137, 144 (1925); *Gorman v. Charlson* (Pa. 1926) 135 A. 250; *Starling v. City of Gainesville* (Fla. 1925) 106 So. 425; but see *Stroud v. Chicago, etc., Ry. Co.* (Mont. 1926) 243 P. 1089.

to the most serious difficulties, all of those involving the scope of protection afforded by the particular rule, the determination of the quality of the conduct involved, and the nicely adjusted functions of judge and jury with reference to these problems. These we have already dealt with.

Our problem, and the primary problem in determining causal relation, is the second: What part did the party's conduct play in the result? Or rather did it play an appreciable or substantial part?³ What instruction, what formula, can the judge give the jury, which will enable them to answer this inquiry? The answer is that the judge cannot do more than propound the inquiry. Nothing more should be expected of him. No matter of law is involved. It is an inquiry of fact and falls wholly within the jury's province when it becomes an issue at all. Perhaps the very simplicity of the inquiry has caused it to be looked upon with misgivings. The tendency of lawyers or any other class of experts is toward involvement. They instinctively feel that appropriate raiment is needed in which to garb the idea. Lawyers employ the terminology of their science lavishly. Frequently the idea is lost in its dress. This has happened in dealing with this simplest of inquiries. "Cause," although irreducible in its concept, could not escape the ruffles and decorations so generously bestowed: remote, proximate, direct, immediate, adequate, efficient, operative, inducing, moving, active, real, effective, decisive, supervening, primary, original, con-

³ Assuming negligence, this was the problem in *Wengert v. Lyons* (Mo. App. 1925) 273 S. W. 143.

tributory, ultimate, concurrent, *causa causans*, legal, responsible, dominating, natural, probable, and others.⁴ The difficulty now is in getting any one to believe that so simple a creature could have been so extravagantly garbed. We refuse to do it; Bacon could not have been wrong.⁵ If we cannot discover a subject in keeping with such habiliments we insist the "princess" has been abducted. If nothing else, we swear allegiance to the myth rather than recognize one of such low simplicity. But the truth is that the myth of "proximate cause" finds its only rivals in those of theological origin.

The question then is: How is the court to hand this problem to the jury?⁶ What formula or standard can it give the jury that will aid the jury in measuring the relative effects of the various causal factors in the case, and what standard shall determine when *enough* connection has been shown to enable the jury to say that a defend-

⁴ See note, 39 Harv. Law Rev. 196.

⁵ In *jure non remota sed proxima spectatus*, etc. (1 Bacon, *Maxims*, 1).

⁶ This inquiry of course assumes that there is evidence before the court raising the issue. In literally hundreds of cases in which the judge was called upon to direct a verdict because the evidence supported only one reasonable inference, the judge, instead of instructing the jury peremptorily as he would if evidence on any other material issue were lacking, undertook to state a test of causation as a matter of law. *Johnson v. Minneapolis, etc., Ry. Co.* (N. D. 1926) 209 N. W. 786, 789, is an example of this sort of error. Our question assumes that there is an issue for the jury. See *McCann v. Sadowski* (Pa. 1926) 135 A. 207, where the court properly disposed of the question on the ground that there was no evidence raising the issue.

ant's wrongful conduct makes him responsible? Is there any such measure at hand? Is there any such standard that corresponds to the "average" man in the determination of negligence or "market value" in the damage element? If there is such a standard, it has never been used generally or consistently by the courts. It is believed that Jeremiah Smith suggested a practical solvent in his so-called "substantial factor" formula: "Was defendant's conduct a substantial factor in producing plaintiff's injuries?"⁷ The criticism usually leveled at the test proposed by Judge Smith is that it does not go far enough. That it is too general. That it does not aid the jury. That it simply states the problem but does not offer a solvent. The answer is that the formula cannot be reduced to any lower terms. It has no multiples. It presents a question of fact, and it would be unusual to expect that any legal rules could be evolved which would be of any assistance in any large number of cases. The answer to any such issue when proposed to a jury must be found by the jury after a consideration of all the facts that bear upon it. While it would perhaps be very desirable to have a formula which exactly fits every possible case it is sufficient to say that there is no such formula. Every case is a new one. The administration of the law is full of similar situations. We use methods every bit as general in solving similar problems and they have been in use so long that we have become accustomed to them. The law's

⁷ Legal Cause in Actions of Torts, 25 Harv. Law Rev. 303; Selected Essays on the Law of Torts, 711. But his definition of the term "substantial" is perhaps too refined.

administration makes them necessary. The prosecution must prove the defendant's guilt "beyond a reasonable doubt." Who knows what a "reasonable doubt" consists of? In very clear cases, of course, the court can instruct a verdict of not guilty. But when the question is one of doubt, the jury must determine the question without any help from the court.

But the closest and most persuasive parallel we have by which to evaluate the proposed formula is to be found in the test of negligence itself. If the "average man" should have reasonably anticipated harm to the plaintiff as the result of his conduct, the duty devolved upon defendant to exercise reasonable care; if the defendant failed to use such care he is negligent and therefore a wrongdoer. How do we assist the jury by this formula? As already explained, we give to them a metaphysical standard. Before they can measure the defendant's conduct they must first translate this metaphysical standard into a standard of their own, which they and they alone can create, then they must measure the conduct of the defendant by such standard. No broader power could be left to a jury. If the question is a jury question at all, their disposition of it is final so long as the jury do not act outrageously. No one really doubts the large content of pure formality in this method of handling the question. No one thinks that a jury regards it with much seriousness. Were it not for the emphasis as to a *standard* of conduct no doubt just as good results would be obtained by asking the jury without explanation the direct question: Was the defendant's conduct negligent? In the absence of any other explanation

by the court, there is no reason to believe that the jury's processes would be any different or that any case would be decided differently. This being the method by which the most important question in a negligence case is submitted and determined by the jury, no room for criticism is left for the similar method adopted when the jury is asked: Was the defendant's conduct an appreciable factor in causing plaintiff's damages? It is true that no metaphysical standard is given to the jury, but that results from the fact that *causal relation* is a natural phenomenon and cannot be subjected to a metaphysical test. If there is any difference in favor of either, assuredly it is in favor of the process of measuring *cause* with which every human being has to do in a multitude of ways every day in his life. Man lives by his constantly cultivated sense of recognizing action and reaction, cause and effect. If there is anything the every-day juror is prepared to do it is to give a just estimate of the effect of conduct and especially after the act and its results have become a matter of history and the only task he is called upon to perform is to trace out and discover the connection. On the other hand, while every man knows many men, the "average man" exists only in "vacuo." He makes a good standard by which to judge the faults of men because he himself is so variable. If he were a *certain* quantity, he would be useless. But the point to be made is that between the jury's use of the average man as a standard by which to judge the conduct of men, and the jury's use of their common sense, common intelligence and common judgment in the determination of the causal connection between ascertained damages and an

ascertained wrongdoer, the balance of certainty and precision must be with the latter.⁸ The terms "substantial" and "appreciable" are not new terms in the law, but they have not been rendered useless by overwork. While they are relative terms, they are recognized as such. They do not purport to be definite as do those other terms so frequently used and which fade so easily. Hence they are not so misleading. They are like the term "reasonable" in the test of negligence. They are of a fast color, although only relative.

While the "substantial factor" test is not exact, to one jury it will mean one thing and to another jury something else, yet in the practical administration of justice nothing better is likely to be found, and if it could be found, it would perhaps be too clumsy for administration at the hands of a jury. The "average man" and the "substantial factor" tests allow the widest range—limited only by the court's power to bound their extremes—but present ideas sufficiently concrete to enable the jury to grasp their meaning and to make use of them in determining the respective problems of culpability and causation. Neither has any place other than in its own formula. They are not convertible terms. The "average man" does well enough

⁸ "The question of proximate cause, in its legal acceptance is, or ought to be, a practical question of common sense"—Sayre, J., in *Ruffin Coal & Transfer Co. v. Rich* (Ala. 1926) 108 So. 596. In the case quoted from, the only question of causation was whether defendant's act contributed appreciably to plaintiff's damage, and that it did was so clear that no issue was raised. But the court was the first to ignore its own dictum. See *Moore v. Northern Pac. Ry. Co.*, 108 Minn. 100, 121 N. W. 392.

as a means for determining the *quality* of defendant's conduct. The "substantial factor" will do equally as well for determining the *extent* of such conduct. One is a qualitative measure; the other a quantitative measure; just as the fact of wrongdoing is one for qualitative analysis, while the fact of causation is one for quantitative analysis. The two problems are on different planes; they have resemblances, but they are not identical. And let it be noted that while the "average man" test is well established at the present day, there was a time before the test for negligence was generalized when it had no recognition. The law of negligence can only recently, if even now, be said to be free from the troublesome "degrees of negligence."⁹ Just as the degrees of negligence, though they were by no means wholly lacking in reason, proved too intricate for successful administration, so it is believed that any too finely adjusted scheme of cause and effect will prove impossible of use as to the determination of causal connection.¹⁰ Simplicity and ease of administration ought to be weighty commendations for any solution of the problem that may be proposed.

⁹ Parts of the discussion by Professor Edgerton suggest a similar strain in the causation problem (72 U. of Pa. Law Rev., pp. 351, 352, 357).

¹⁰ See Professor Edgerton's Suggested Instructions to Juries, 72 U. of Pa. Law Rev. 372.

SECTION 2

PLURAL, CONCURRENT, AND INTERVENING CAUSES

Plural causes, concurrent causes, and intervening agencies, have occupied the greater part of the courts' time in dealing with causal relation. They have been made the occasion unnecessarily of much of the complexity in which the subject is enshrouded. Let it be noted that the problem of joint and several liability of several tort feorsors is not dependent upon any concept of causation. Whether two persons acting in concert or acting independently, but contributing to the same injury, are to be held for all the damage done or only the part produced by each, is a problem of policy only pertinent for consideration under other elements. A plaintiff may seek to recover against one or more persons for an injury, but the only relevant *cause* inquiry is what part was played by each, or all, in producing the result. The court is only interested in knowing whether the contribution made by those sought to be charged is sufficient to make them responsible in damages. There are a multitude of cause factors in almost every case, but if the plaintiff only seeks to charge one of them, a single defendant, necessarily there is much less burden thrown upon the court than if the plaintiff seeks to recover from several of them. But the process is the same whether one or many be charged.

Intervening agencies, whether human or animal, ani-

mate or inanimate, have little pertinency in a discussion of causal relation.¹¹ They are of great importance in determining legal liability, but their importance arises in the consideration of the scope of protection afforded by the rule of law invoked in a particular case, that is, whether they create risks against which a complainant is afforded protection. The parts played by such factors are only relevant to any consideration of causal relation by way of comparison and then only if they are hazards against which the rule relied on affords no protection. If they are beyond the range of the rule's protection, then the question may arise whether defendant's wrongful conduct played any appreciable part in the result in view of the very great part played by such intervening or independent agencies. Ordinarily such comparison and determination

¹¹ Attempts are still being made to make these metaphysical solvents do service. "Intervening agency," "chain of causation," "independent intervening agencies," "a set stage," etc., are favored ways of characterizing these solvents. If these terms were used as mere figures of speech to describe vividly various situations, they would not be hurtful, and this is the only service they can render. The moment they are crystallized into a formula trouble necessarily begins. They then become not the means of communicating thought, but the subjects of interpretation. The real problem is lost in the attempt to unravel its alleged solvent. Instead of determining whether protection against a certain risk or hazard is within the purpose of the rule which plaintiff relies on, the courts go chasing about to find whether the hazard was produced by an "intervening agency," which broke the "chain of causation," or whether it was a mere "stage," etc. The real problem is made to await the determination of an immaterial as well as a fantastic side issue. This is the course ordinarily pursued although it would be much easier to solve the real problem in the first instance.

would fall within the province of the jury—always, unless so clear that only one reasonable conclusion could be reached.

CASES ANALYZED

Although, in light of the previous chapters, all these points should be apparent, cases considered of more than ordinary difficulty and significance are analyzed by way of further illustration.

D kicked P slightly, but the kick bruised P and blood poison or some other infection developed whereby P was seriously injured in his person. The result was wholly unintended and unforeseen.¹² P sued D, invoking the rule of law that protects a person from intended violations of his bodily security. Personal injury, slight or grave, is protected against by this rule. D was clearly a wrongdoer and serious injury followed. The issue was whether his wrong appreciably contributed to the injury. The jury so found. Of course, if it should have been made to appear that P's physical condition, obviously one of the cause factors, was such that the kick could not be said to have been an appreciable factor in producing his injury (a question of scientific fact), then D would have been entitled to a verdict for lack of causal relation.¹³

In *Tullgren v. Amoskeag Mfg. Co.*,¹⁴ it appeared that decedent became so sick while at work at defendant's fac-

¹² *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403.

¹³ See *Watson v. Rinderknecht*, 82 Minn. 235, 84 N. W. 798; *State v. O'Brien*, 81 Iowa, 88, 46 N. W. 752; *Hahn v. Delaware, L. & W. Ry. Co.*, 92 N. J. Law, 277, 105 A. 459.

¹⁴ (N. H.) 133 A. 4 (1926).

tory that the overseer sent her home in an automobile kept and used by defendant. When about 700 feet from her home, the driver left her on the road and she went by foot the rest of the way. Soon after reaching home she died. In a suit to recover for her death the contention was made that there was no evidence of causal connection between the alleged negligence and decedent's death. Medical experts were called as witnesses who testified that in their opinion the decedent died of heart trouble caused by overexertion. In sustaining exceptions to the granting of directed verdict, the court said: "There being evidence of the defendant's negligence as the cause of the overexertion, and of the overexertion as the cause of death, and no other cause of her death being conceded or conclusively proved, it was for the jury to pass upon it."

Defendant having undertaken to carry decedent to her home, her physical welfare was clearly an interest within the protection of the rule which defendant violated in subjecting decedent to the hazard of overexertion or other exposure. Apparently the only difficult problem was the determination of causal relation between the wrong and the damage. This was purely a question of fact, "scientific" fact, in view of the limited capacity of the every day man to trace the causes of death.

Plaintiff, while a passenger on a street car, by reason of the negligent handling of the car, was caused to be thrown loose from the strap to which he was holding and against the floor of the car. He was rendered unconscious for a few minutes but, aside from several scratches and a small contusion over his ear, did not appear to be otherwise in-

jured. These marks disappeared within a few days and he went about his business. Eight months later paralysis supervened. In a suit against the Railway Company to recover damages for his totally impaired health and physical condition,¹⁵ the only serious question was one of causal connection. Did the paralysis result from the fall? The issue was simple in its nature, but rested solely upon a scientific inquiry into the facts. It was decided as any other fact issue.¹⁶

In *Stacy v. Knickerbocker Ice Co.*,¹⁷ a span of horses hired from plaintiff by defendant for cutting ice ran away and fell into a hole which had been cut by defendant but not fenced as required by statute. It was clear that if the fence had been built the result would have been the same. Assuming that the statute was for the purpose of preventing such an injury, an assumption perhaps not warranted, still what connection did the wrongful act have with the result? The judge said there was no evidence of any connection. Thus there was no issue for the jury. The problem was very simple.¹⁸

¹⁵ *Bishop v. St. Paul City Ry. Co.*, 48 Minn. 26, 50 N. W. 927.

¹⁶ See *Rasmussen v. George Benz & Sons* (Minn. 1926) 210 N. W. 75; *Berglund v. Hild* (N. J. 1926) 135 A. 52; *Western Union Tel. Co. v. Preston*, 254 F. 229; *Larson v. Boston Elevated Ry. Co.*, 212 Mass. 262, 98 N. E. 1048; *Mann Boudoir Car Co. v. Dupre*, 54 F. 646; *Brown v. C., M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Mathews v. Kansas City Rys. Co.*, 104 Kan. 92, 178 P. 252; *Custer v. Kroeger* (Mo.) 280 S. W. 1035, 44 A. L. R. 1328.

¹⁷ 84 Wis. 614, 54 N. W. 1091.

¹⁸ *Sowles v. Moore*, 65 Vt. 322, 26 A. 629; *Ford v. Trident Fisheries Co.*, 122 N. E. 389, 232 Mass. 400.

In *Cory v. Havener* and in *Cory v. Adams*,¹⁹ plaintiff's horse was frightened and caused to run away by defendants who were speeding their motor vehicles on the highway. One of defendants passed plaintiff on one side, and the other on the other side. Both machines were making great noise and emitting smoke. There was nothing to show which caused the horse to take fright, or what part either contributed to such fright. The court gave a recovery against each for the full amount of the damages. The only question of cause involved was whether each appreciably contributed to the injury. This was a fact question for the jury, and it could only be determined by them after considering all the factors involved. This is the only cause issue involved in any case where plural cause factors are sought to be held responsible,²⁰ and it is of no materiality on this point whether they be concurrent, successive or intervening, so long as it is found that they played an appreciable part. Such variations in time are highly material, however, in determining fault or wrongdoing.

In *Anderson v. M. St. P. Ry. Co.*,²¹ plaintiff sought to recover damages for loss caused by fire alleged to have been set out by the negligence of defendant in the operation of its engines. The defense was rested mainly on the point that the fire which caused the loss was of unknown

¹⁹ 182 Mass. 250, 65 N. E. 69 (1902).

²⁰ See *Farley v. Crystal Coal & Coke Co.*, 85 W. Va. 595, 102 S. E. 265, 9 A. L. R. 933, for a most irrational contrary holding based on a supposed distinction between "direct" and "consequential" damages. See, also, notes in 29 Yale Law J. 935, 23 Harv. Law Rev. 406, 4 Col. Law Rev. 367; 27 W. Va. Law Quart. 200.

²¹ 146 Minn. 430, 179 N. W. 45 (1920).

origin. The court approved the charge of the trial court as follows:

"If you find that other fire or fires not set by one of the defendant's engines mingled with one that was set by one of the defendant's engines, there may be difficulty in determining whether you should find that the fire set by the engine was a *material* or *substantial* element in causing plaintiff's damage. If it was, the defendant is liable, otherwise it is not."

This was a rational view of the problem and left the matter to the jury to determine under all the facts. The court found no occasion to consider concurring or intervening causes, for it had been made clear that defendant was negligent and such factors had no further pertinency. The question was narrowed to finding the part defendant's wrongful conduct played in the result. If substantial, then it was responsible, otherwise not.

In *Weeks v. McNulty*,²² deceased, a guest of defendant's hotel, was burned to death in his room when the hotel was destroyed by fire. His wife sought to recover on the ground that defendant had violated the statute requiring the hotel to be equipped with fire escapes. Recovery was denied on the ground that the evidence having shown that deceased locked himself in his room and after being awakened was so frantic that he could not unlock the door, it was apparent that the lack of fire escapes played no part in his death. This was so clear that the judge was warranted in refusing to submit the matter to the jury. The rule in-

²² 101 Tenn. 495, 48 S. W. 809 (1898).

voked was designed to protect against death from fire, defendant had violated the rule, but the facts raised no issue of causal connection.²³

In *Laidlaw v. Sage*,²⁴ plaintiff was injured in the office of Russell Sage by an explosion of dynamite set off by one Norcross, who was seeking to compel Sage to pay him a large sum of money under threat of wrecking the building and killing its occupants. It appeared that Sage backed off from Norcross and, having reached the point where plaintiff was standing, gently pulled plaintiff's body between Sage and Norcross. While in this position, Norcross exploded the dynamite which injured plaintiff. Plaintiff's action was based on the wrongful act of Sage in making a screen of plaintiff's body. Assuming that this was a wrongful act, and assuming that the hazard was one within the scope of the rule at the basis of the action (both of which assumptions are perhaps warranted), the determination of what part this wrongful conduct played is a real problem in causation. Was defendant's conduct an appreciable or substantial factor in producing plaintiff's injuries? The Supreme Court thought the facts sufficient to make an issue and left the point to the jury, and the finding was favorable to plaintiff. The Court of Appeals thought there was no issue and that a verdict should have been instructed in behalf of the defendant. The decisive point therefore was whether there was any evidence to go to the jury on the issue of causal relation. No doubt if

²³ Acc.: *Radley v. Knepfly*, 104 Tex. 130, 135 S. W. 111.

²⁴ 72 Hun, 125, 25 N. Y. S. 955 (1893); same case, 158 N. Y. 73, 52 N. E. 679.

Sage had called plaintiff from another room, a place of safety, into his office, a place of danger, the case would have been very clear against Sage.

In *Haverly v. State Line, etc., Ry. Co.*²⁵ by reason of defective spark arresters on one of defendant's engines, an old stump near the track was set on fire. Plaintiff sent an employee to put out the fire and it was thought the fire was extinguished. Next morning a high wind arose and fire broke out near the stump and swept plaintiff's land. The defense was that the wind was an intervening agency and the proximate cause of the loss. The court left the question of proximate causation to the jury, and recovery was allowed. Whether the wind was a cause factor was not an issue. The only question of causation was whether the fire set by defendant was the origin of the fire which swept plaintiff's land. If so, that both it and the wind were appreciable factors was apparent. The intervention of the wind was a factor to be considered in determining whether it was a risk against which the rule invoked was designed to protect. This was for the judge, but it was erroneously left to the jury under the guise of proximate cause and found favorably to plaintiff. This having been determined, by whatsoever means, and it appearing either by the undisputed facts or by the verdict of the jury that defendant was negligent in operating its engine, the defendant, in absence of contributory negligence, was properly held responsible.

In *Baltimore & Ohio Ry. Co. v. Sulphur Spring School*

²⁵ 135 Pa. 50, 19 A. 1013, 20 Am. St. Rep. 848 (1890).

District,²⁶ plaintiff's schoolhouse was swept away by a most unusual storm and flood. Plaintiff sought to recover of defendant by reason of the fact that its embankment across a hollow was not sufficiently provided with culverts and that those which were provided were clogged with débris. The facts showed that had there been many more culverts, all unobstructed, the result would have been the same. Recovery was denied because there was no proximate causation. The judge exercised his function of refusing to submit the case to the jury because no issue was made on causal relation. He could have also exercised his function to say that such a risk as this was not within the protection of the rule invoked by the plaintiff. If he had done this the causal relation problem would not have been reached. Both were decisive grounds, but the judge passed over the one which first presented itself.²⁷

A number of difficult problems are put by Professor Edgerton, the analysis of which will further indicate the contrast between the difficulties arising in the several problems of legal liability.

D ejects P from a house in zero weather; P lies where D drops him and is frozen but warmth and shelter are abundant in the neighborhood.²⁸

²⁶ 96 Pa. 65.

²⁷ *Piqua v. Morris*, 98 Ohio St. 42, 120 N. E. 309; *Montgomery L. & W. P. Co. v. Charles*, 258 F. 723. See *Williams v. Columbia Producing Co.*, 80 W. Va. 683, 93 S. E. 809 (1917).

²⁸ Cf. *Hendrickson v. Com.*, 85 Ky. 281, 3 S. W. 166; *State v. Preslar*, 48 N. C. 421. See 72 U. of Pa. Law Rev. 361.

P's interest in his bodily security is clearly a protected one. The risk of harm from the severe cold weather clearly falls within the scope of the rule here invoked which was admittedly violated by defendant. Was there causal connection between this wrongful conduct and the damage that followed? Had the result been frostbite instead of death, or had there been no shelter available there would doubtless be no hesitation in discovering the causal connection. The problem here is made complex by the stubbornness of D in choosing to lie out in the cold rather than seek warmth and shelter which were near at hand. This is a factor, the risk of which is clearly not protected against by the rule invoked, but is one which clearly contributed to the result. The problem is, therefore, in view of P's conduct, did defendant's act appreciably contribute to P's death? This would have to be answered in light of the part this other factor played in the result. The judge would have to determine whether here was an issue to go to the jury. Judges could conceivably disagree about the matter, but perhaps they would generally be inclined to say that there was no issue raised. If submitted at all, the jury's verdict either way would be final. The difficulty is not with the process, but with the attitude of judges which impels them to hesitate in following it, or the desire not to risk the possibility of a jury's finding against what would seem to be the better reasons. No process can be evolved which will be proof against such fears and anxieties on the part of judges; they are incident to any system of administering justice.

A case very similar is *The Mars*²⁹ in which the tug, *The S O No. 8*, collided with the barge, *The Mars*, so as to cause an opening in the latter's planks about three feet above the water line. Those in charge of *The Mars* continued to load her until the opening was submerged below the water line so that she filled and sank. The collision was such as to make all of those present on *The Mars* fully conscious of what had occurred. But nothing was done to repair the damage. The court ostensibly turned the question on causal connection, saying in part:

"A great deal has been written about reasonable and proximate consequences, and for myself I never have had much enlightenment, except on this which seems to me is the only intelligible line of decision. What would an ordinary man expect under all the circumstances to be the result? If something supervenes which nobody would expect, and no one had a right to expect, I think the authorities hold, or should be interpreted, at least, as holding, that that is not attributable to the wrongdoer. I do not think it is enough, and I do not think any one supposes it is enough, that in the mere train of physical causation the result should follow from the wrongful act. There must also be some mental element. It has got to be one of those consequences which is not entirely outside the range of expectation or probability, as ordinary men view it."

If the boat had filled and sunk without further ado after the collision, there would have been no doubt as to the tug's liability. There would have been a protected interest, a violation of a rule designed to protect such interest,

²⁹ 9 F.(2d) 183 (1914).

i. e., the wrongful collision, a hazard which falls within the range of the rule violated, causal connection and damage. But as actually turned out there was the indifferent attitude of those in charge of the barge indicated by the continued loading, which was also a factor in causing the losses. Was this factor also a hazard which the rule violated by the tug was designed to protect against? Here the court was compelled to exercise its primary function of defining the scope of the rule's protection. This factor would in some cases be designated as contributory negligence, in others a failure to minimize the damages, in others an independent wrong on the part of the injured party. The case is similar to those in which a person wounded has by his own wrongful act rendered his wound more serious. Whatever the factor may be named, it is clear that the problem is to determine whether it is a hazard which falls within the range of the rule's protection which has been violated. If this is resolved against the claimant, it is decisive of the case.

But assuming it to be resolved in claimant's favor, there remains the second inquiry: As compared with the conduct of those in charge of the barge subsequent to the collision, was the damage done by the collision an appreciable factor in bringing about the further losses, a pure cause inquiry. This may require the exercise of two successive functions: First, is there any evidence raising such an issue; second, the determination of the inquiry by weighing the evidence. The first is clearly a function of the judge. The second would be for the fact-finding agency

whether judge or jury. The answer to either would not require any formula of expectancy or probability, but only the exercise of what we may call common sense.

It is perhaps clear that the determination of either problem should have been favorable to the tug, and so the court holds. The only regret is that the two problems were confused and the impression left that the court thought that "expectation or probability" had a part in determining the causal relation between the collision and the losses claimed.

"Suppose D, a chauffeur, drives his car over a small flat box. This is negligent toward A, a passenger, in that it is likely to give him a slight jolt. But the box contains a high explosive which explodes and kills A. Would it be reasonable or just to hold D responsible for the death?"³⁰

As the case is stated, D's conduct was not wrongful, since no harm was probable; no legally protected interest was threatened. But assuming such probability of harm as would constitute negligence, if A's neck were broken by the jolt, however improbable such a consequence might be, D would be liable. A's physical well-being was an interest which D was obligated to protect and the risk of injury by a jolt was one clearly to be guarded against. It being admitted that the jolt broke A's neck there would be no issue of causation. But in the case given an entirely different factor operated in bringing about A's death. The jolt caused no injury; it simply set off the explosive concealed in the box. Was this a hazard within the scope of the protection afforded by the rule relied on? This is the

³⁰ 72 U. of Pa. Law Rev. 362.

judge's question, and his answer would no doubt be a negative one which would be decisive. Assuming, however, that the judge should decide this point favorably to A, the causation issue would be reached. Was D's conduct a substantial factor in bringing about A's death? No doubt D's conduct was a factor, but was it a substantial factor? If the judge should be of the opinion that there could be two reasonable views taken of the matter, it should go to the jury. The jury, in turn, might find either way. The successive gauntlets which a plaintiff must run in a case like this inevitably develops its weakness. In this particular case there would be little possibility of the plaintiff getting a favorable decision by either judge or jury.

"D negligently knocks down A in the street. It is more or less likely that the team of X will run over A before he can get up. A is not, in fact, run over, but is struck and injured, as he is getting up, by a quantity of snow and ice discharged upon him from the roof of a nearby house. The result is the risked result—personal injuries to A, but the means is not the risked means. Is it not much less clear that D ought to be held for the injuries than it would be if they had been produced by A's being run over?"⁸¹

There were no injuries sustained by A from being knocked down. The injuries resulted from being knocked down plus the discharge of melting ice and snow from the housetop. The writer assumed the answer to the most difficult question raised by his case. Was the harm a risked one? Clearly harms from being knocked down and from being run over by X were risked, but it is not at all clear that harm from ice discharged from a roof is such a

⁸¹ 72 U. of Pa. Law Rev. 363.

risk against which the rule violated afforded protection. Suppose a comet or an airplane had fallen on A before he could get up? This would require the judge to mark the limits of the rule relied on for recovery. But assuming this harm to be within the range of the rule's protection, was D's conduct an appreciable factor in producing it? Can any rule of law solve it? If it is a question of fact about which there is doubt why not leave it to the jury as any other doubtful fact question? What will the jury do with it? Can any judge advise them how to solve it? It is no more difficult than many other cases. The jury's verdict ought to be final. Their common intelligence, common sense, common judgment, are the only sources to which we can appeal for a decision of a cause issue which is doubtful.

"A municipality maintains an excavation dangerously near to the traveled part of a street or sidewalk. If X negligently forces P into the excavation, the city is responsible, but if X produces the same result intentionally, the city is not responsible." ³²

Both results are not without reason. *First*, was X's *intentional* conduct a risk against which P's interest was protected by the rule invoked? Likely the judge would say not, and that would be decisive of the case. *Second*, was X's *negligent* conduct such a risk. The court most probably would find so and then, negligence being assumed, the inquiry would be: Was the city's negligence an appreciable factor in producing the result? But even

³² 72 U. of Pa. Law Rev. 365; *Carterville v. Cork*, 129 Ill. 152, 22 N. E. 14; *Alexander v. Newcastle*, 115 Ind. 51, 17 N. E. 200.

should this issue be reached in both cases, juries might find differently. The determination of the result of D's conduct in any case is purely a relative matter. The jury may have several factors in a case and what would be considered appreciable in one case might not in another. So, as compared with X's negligence, the city's conduct might be considered appreciable, while as compared with X's intended violence, the city's conduct might not be so considered. No rule of law can give the jury any assistance in these cases.

The big point, however, is that in the case of P's being intentionally forced into the excavation, the court would probably hold the harm received was not a hazard protected against by the rule invoked, while in the other case it was. The duty to protect P against hurt from the excavation does not comprehend risks arising from X's intentional acts, while it does his negligent acts.

"The *Lusitania* sailed into waters known to be infested with German submarines after the German government had announced its intention of sinking her if she did so. Held, the action of the vessel was not a legal cause of the loss of life that resulted when she was sunk, because the independent illegal act of the submarine intervened." ³³

Whether the element of negligence was an issuable one is doubtful, for a reasonable person might well have taken the risk under the circumstances. It was at least for the jury. The question of causation was possibly an issuable one, though a jury might have found that defendant's wrongful conduct played no appreciable part in the loss of

³³ 72 U. of Pa. Law Rev. 365; The "*Lusitania*," 251 F. 715.

life. The court, in directing a verdict for the plaintiff, established a precedent for which no satisfactory rule of causation can be found. The illegality of the submarine's act is certainly not a distinguishing point. That was a risk which the vessel's passengers were entitled to be protected against. This is one of those instances in which the courts refuse to give a plaintiff the benefit of a jury's judgment. The courts in such cases seem to become frightened at the great liability the defendant has probably incurred.³⁴ This too is a result that cannot be obviated as long as judges are human. It is one of the risks inherent in any judicial system.

"Suppose D negligently³⁵ knocks A down, and before A can get up X seizes the opportunity to kill him by a kick in the face. Probably few of us would think it just to hold D for the death."³⁶

"Or D by negligent driving runs down and injures A, who thereupon postpones a trip on which he was setting out and returns home for treatment; A's son next day contracts scarlet fever which is communicated to A and leads to his death."³⁷

"In each of these cases it is clear that D's act was an actual cause of the death; that is, but for D's act the death would not have occurred; but in neither case was it a legal cause."³⁸

Both cases would go out on the rulings of the court that neither risk was protected against by the rule invoked. They are not risks within the range of the rules violated

³⁴ Cf. *Ryan v. New York Central Ry.*, 35 N. Y. 209 (1866).

³⁵ Or even, as in *People v. Elder*, 100 Mich. 515, 59 N. W. 237, intentionally.

³⁶ 72 U. of Pa. Law Rev. 250.

³⁷ *Id.*

³⁸ *Id.*

by D's wrongful conduct; D's conduct is not required to be refrained from on account of such risks.

Also it is by no means clear that D's conduct in either case was an appreciable cause factor. It was a cause *sine qua non*, but was it a *substantial* factor? Such issue would be for the jury, if the rulings on prior issues were favorable to plaintiff. The court has no better means at hand for solving it than a jury and since it is a question of fact, under our procedure it falls within the jury's province so long as it is in fact an issue. Some courts might indeed hold that there was no issue for the jury, but that would not be a determination of any rule of causation; such would be merely a determination that the facts were so clear as not to raise any issue of cause.

"D sells dynamite to a small boy; the boy's parents take it away from him, but later give it back to him and he explodes it and is hurt. It is clear by a preponderance of the evidence, it is even clear beyond a reasonable doubt, that the boy would not have been hurt if D had not sold him the dynamite. * * * Yet D is not liable, because not a legal cause. The intervention, after the danger which the defendant created appeared to be over, of the boy's parents, makes it seem unjust to hold D." ³⁹

Why should it be unjust to hold D? Was the risk one that D was under an obligation to protect the boy against? If so, it is clear that D was a wrongdoer. His only hope of escape must lie either in the fact that some public policy dictates that he should not be held or that his wrongful act was not a substantial factor in producing this harm. He

³⁹ 72 U. of Pa. Law Rev. 345, 346; *Carter v. Towne*, 103 Mass. 507.

was a factor without doubt. But was he a substantial factor? If it is clear that the parents' fault was the controlling factor in this case, then the court might instruct the jury for defendant. There would be no issue for determination by the jury. But if the court can say that there may be two intelligent opinions as to this point, then it should go to the jury. The jury's determination would be conclusive. Juries as well as judges would likely differ in different cases, and no doubt should, because the exact part that each factor would play in the result would in all probability vary in different cases. A court's determination that there was no causal connection would prove an embarrassing precedent as there would likely be considerable difference in the facts of other similar cases. But a jury's verdict would only settle the particular case and leave all the others to follow for determination on the basis of their own facts. This course would be preferable, for however desirable it may be to make the law certain, there are limits beyond which certainty cannot be had without seriously embarrassing the just administration of the law. In other words, justice will no doubt be the better served by leaving to the jury their own problems.

Plaintiff sued defendant for personal injuries produced by being run over by D's train. D maintained its railroad through a cut in the town of Mebane. P and several playmates used the sides of the cut as a slide. On the day of the injury to P, D was operating its train through the cut in excess of the speed limit. While the train was passing a playmate pushed P under the train. Held, that D was negligent, but not the proximate cause of P's injury. The

court said: "This (the playmate of P) was the intervening, independent, sole, proximate cause of the injury, for which the defendant cannot be held liable. The injury was not the natural or probable consequence of defendant's negligence in exceeding the speed limit—pushing the boy under the train was the proximate cause of the injury." ⁴⁰

The risk was not one against which D was under an obligation to protect P either by virtue of the speed statute or any rule of common law. The rule invoked was not designed to protect P against such hazards. But as the case was decided, the court determined that the playmate was the "proximate" cause of the injury. It used no formula to reach such conclusion, but in order to determine that defendant was not the proximate cause the court deemed it necessary to employ the "probable consequence" formula. The humor involved in such holdings seems never to break through.

Defendant burned some waste paper on a vacant lot back of his store. Children played on the lot. Thirty minutes after defendant left the embers some boys came along and gathered up other waste paper and put it on the embers, causing the added material to flame up. A little girl, five years old, came up to the fire and, while warming her hands, the wind blew a burning paper against her, setting her clothing on fire and causing her death. The suit is by her administrator for her death. Held: "The negligence of defendant * * * was not

⁴⁰ Lineberry v. North Carolina Ry. Co. (N. C.) 123 S. E. 1 (1924).

the proximate cause of the injury, because there was the intervention of another and independent human agency, which broke the relation of alleged cause and effect.”⁴¹

The court considered as an issue of causation what perhaps involved three questions. *First*, was this a risk against which D owed the child protection? *Second*, was defendant negligent? *Third*, was defendant’s conduct an appreciable factor in producing the result? Assuming the court held favorably to plaintiff as to the first, perhaps the second and third should have gone to the jury. In any event, the court erred in attempting to determine the cause issue by its own processes. In other words, its problem at this point was whether reasonable minds could reach different conclusions about the matter. Instead of considering this problem, the court declared that defendant was not the cause of the injury, and set up a rule of causation which is not true.

P alleged that D, as the owner of a flock of sheep, failed to furnish P, the herder, sufficient fuel for his camp as was the custom in such business, on account of which P was forced to go to bed. A storm was raging and the sheep were scattered. Next morning, while the storm continued, P went out after the sheep and suffered frozen feet. Held, demurrer sustained. The result was an unforeseen one. “While on the one hand it might reasonably be anticipated that plaintiff would make an effort to save the sheep, so, on the other, the defendant had the right to rely on the existence in plaintiff of the stronger

⁴¹ Fuller v. Hessler (Mich.) 197 N. W. 524 (1924).

instinct of self-preservation. And the deliberate act of plaintiff, or at least that deliberate act in conjunction with the other intervening agencies, was * * * the proximate cause of the injury to plaintiff; and the failure to furnish fuel * * * was only the occasion or condition thereof.”⁴²

Negligence is properly assumed, inasmuch as the risk was one against which D clearly owed P protection, and the only question is the existence of causal connection between P's frozen feet and the failure to provide fuel for P's camp. There was undoubtedly some connection alleged as the inference is clear that, if fuel had been furnished, P would not have gone to bed and the sheep would not have been permitted to wander off. Was this an appreciable factor as compared with the storm, and P's own undertaking to save the sheep despite the lack of fuel in the camp? If the court had said that there was clearly no such connection to be reasonably inferred from the facts alleged, hence, no issue for the jury, the ruling would be understandable, and while it might not be thought correct, still there would be no vital principle involved. But the court held that the plaintiff's deliberate act in going out in the storm *was* the proximate cause of the injury. The point is, how did the *court* determine what was the proximate cause? Did the court in determining the “proximate” cause apply the test which it declared prevented the lack of fuel from being the proximate cause? Not at all, the court (usurping the jury's function) needed nothing

⁴² *Lemos v. Madden*, 200 P. 791 (Wyo. 1921).

more than its intuition and common judgment. The court was in error in not allowing this question to go to the jury if there was in fact an issue.

D, engaged in constructing a sewer in a public street, after quitting work left several sticks of dynamite in an old tool box in the street. Some boys ranging in age from 6 to 14 took several sticks of dynamite from the box and threw them upon a fire in an adjacent field. Plaintiff, an innocent bystander, was burned by an explosion of one of the sticks. Held, that as the result was not to be anticipated, it was remote.⁴³

The court ostensibly assumed negligence as the dynamite was not stored according to statutory regulations. But what the court really did was to assume negligence *as a matter of words* and then actually determine there was none by applying the test of negligence at common law. The risk was no doubt one against which the statute was designed to protect, and the real issue was whether the defendant's conduct was an appreciable factor in producing this result. This was possibly an issue for the jury, but the court cut off inquiry by the jury by invading the jury's province and, after its own application of the negligence test, declared there was no "proximate" cause.

Perry v. Rochester Lime Co.⁴⁴ is similar in essential details except that in the latter case the boys were older, the public place more remote, the theft appeared to be for the purpose of reselling the goods, and the time and place of the explosion were more distant from the situs of de-

⁴³ Horan v. Watertown (Mass.) 104 N. E. 464 (1914).

⁴⁴ 219 N. Y. 60, 113 N. E. 529.

defendant's negligence. It was held that the violation of the ordinance constituted defendant a wrongdoer, but the wrong was not a proximate cause of the injury. The weakness in the case was whether the theft of the explosives by legally responsible persons was a hazard within the purview of the statute. This was at least doubtful and demanded the judge's ruling. While the decision in this case on the cause issue is less to be doubted than in the Massachusetts case, the reasoning is wrong. The analysis is the same as that of the former case. Here, to say the least, is a doubtful case of causal connection. Did defendant's wrong contribute appreciably to the result? Let an illustration suffice. Suppose D exceeds the speed limit and X, a small child, steps from behind a tree in front of the speeding car. Would D be held for the child's death? The most difficult point would be whether this is a risk against which the statute is intended to protect—a question of law for the judge. Also, the question would arise: Did D's *negligence* contribute appreciably to the injury? The court might say there is no issue. If submitted to a jury, it is conceivable that the question might be answered either way.⁴⁵ Is that not the case here? Was the defendant's violation of the ordinance an appreciable cause of the injury?

P, a passenger on D's train, was injured by reason of the train colliding with an automobile which was hurled against a switch; the switch was opened so as to turn the train on to a side track where it collided with box cars.

⁴⁵ Regina v. Dalloway, 2 Cox, C. C. 273 (1847).

The court held that since the circumstances were so unusual and improbable there was no proximate cause.⁴⁶

The court hurried over the weak part in P's case, to wit: defendant's negligence. There is no evidence that the collision with the automobile was a negligent one. Assuming, however, that the train was being operated at too rapid a speed at a crossing, was a collision with box cars on a side track a hazard which the rule of law regulating speed at crossings was designed to protect against? The result of the decision is correct. The basis of the decision is faulty. This is a frequent error made by courts. It is quickly seen that there should be no recovery. Such a decision is made, but is placed upon a wrong ground. If the risk had really been one within the scope of the statute, there is no reason why plaintiff should not have recovered. The cause issue ought in such case to have been resolved in P's favor as a matter of law. The collision with the automobile produced the collision with the box cars and that in turn P's injuries. The causation is as clear as in *Hill v. Windsor*.⁴⁷

In *Illinois Cent. Ry. Co. v. Wright*,⁴⁸ P sued D for damages to his crops caused by the failure of D to keep open a culvert and drain across its right of way, which resulted in the water backing up and flooding B's land on the east side of D's track. It appeared that P also owned the land on the west side of the track and that the drain across this

⁴⁶ *Engle v. Director General of Railroads* (Ind. App.) 133 N. E. 238 (1921).

⁴⁷ 118 Mass. 251.

⁴⁸ (Miss.) 100 So. 1 (1924).

tract of land was likewise filled up so that if the culvert and drain across the right of way had been open, the same result would have followed. Held, that D was not the proximate cause of the injury in that the failure to provide a clear passage across the right of way "was not an act without which the damage would not have occurred."

The court's holding that defendant's act was not a cause factor is erroneous. The real basis of its nonliability, if any, is the fact that plaintiff was not in a position to assert his right since he himself was in the attitude of one also at fault. Suppose X had owned the land on the west side of the right of way? Would P have been denied recovery in such case?

In *Douglas, Burt & Buchannan Co. v. Texas & Pacific Ry. Co.*,⁴⁹ defendant delayed plaintiff's boat by maintaining an unlawful bridge over the bayou. But if plaintiff had passed the bridge promptly it appeared that on account of high water plaintiff could not have passed another bridge which was lawfully maintained, hence the delay caused by defendant caused plaintiff no damage.

This type of case is frequently considered as presenting a most difficult problem of causation. Even so careful a writer as Jeremiah Smith says:

"A defendant's tort cannot be considered a legal cause of plaintiff's damage if that damage would have occurred just the same even though the defendant's tort had not been committed. Exception: Where two tort-feasors are simultaneously operating independently of each other, and

⁴⁹ 150 La. 1038, 91 So. 503 (1922).

the separate tortious act of each is sufficient in and of itself to produce the damaging result." ⁵⁰

Professor Edgerton is even more emphatic⁵¹ but the problem is not one of causal connection. The conduct of the defendants in both cases contributed appreciably to the results. The fact that the same result would have ensued irrespective of defendants' acts does not mean that defendant did not contribute thereto. Neither does the fact

⁵⁰ 25 Harv. Law Rev. 323; Selected Essays on Torts, 714. See, also, McLaughlin: Proximate Cause, 39 Harv. Law Rev. 153-155.

⁵¹ "So, if D's wrongful act and the innocent act of another, or D's wrongful act and a natural force, were, each alone, sufficient to produce the damage, D's act is not a legal cause of the damage; but if D's wrongful act and the wrongful act of another were each alone sufficient to produce the damage, D's act (and also the other) is a legal cause. Yet D's act stands on the same logical relation to the result, whether the other is a wrongdoer, an innocent person or a thunderstorm. The likelihood of the result may be the same; its directness or indirectness is the same; the difficulties of proof, if any, are the same; and the burden on the court's time is the same. But our sense of justice demands the imposition of liability when the harm should not have happened but for the wrongful action of human beings, while it does not make the same demand when the harm would have been produced by an innocent person or a natural force, if there had been no wrongful human action. And this discrimination can probably be rationalized in terms of social interest. If the wrongful acts of D and X were each sufficient to cause the harm, to hold each responsible for the harm, and thereby discourage similar acts, tends directly to prevent the occurrence of similar harm; on the other hand, if D's wrongful act and X's innocent act, or D's wrongful act and a natural force were each sufficient to cause the harm, to hold D responsible and thereby discourage acts similar to his would tend less strongly to prevent the occurrence of similar harm, as it would have no effect on innocent acts and natural forces." 72 U. of Pa. Law Rev. 346.

that the other agency contributing to the result is either a natural force, or an innocent or wrongful act of another person, in any wise affect the causal relation. The exception named by Judge Smith is not an exception to any rule of causation. The problem presented by such a situation as arose in the foregoing cases is this: Should the defendant be *excused* from liability where the damages brought about by his wrongful conduct would have befallen the plaintiff regardless of defendant's act? This presents a problem of policy of the same nature as that involved in determining against what risks an interest will be protected or the *wrongfulness* of conduct itself. There are numerous factors that enter into this consideration of which causal connection, if one at all, is a minor one. It might well be that in determining such problem, the innocence or the guilt of the other cause factor would be of considerable weight. It may be doubtful whether the problem has always been properly solved, but assuredly it is not a problem of causal relation.

SECTION 3

INTENTIONAL WRONGS

It has been generally assumed that causal connection in cases involving intentional wrongs is a different problem from causal connection in negligence cases. There is no satisfactory reason why such should be true. It is not believed that it is true. The ease with which courts handle the issue of causal connection in Workmen's Compensation Cases arising out of negligence, but where the negligence itself is immaterial, ought to throw doubt on any

such distinction. The "probability" or "foreseeability" formula has no place in such cases. It is a question of fact pure and simple.⁵² Causal connection is a neutral problem, presenting exactly the same difficulties in all types of cases. The reason for the general assumption that causal connection is something different in intended wrongs is because it is more easily isolated in such cases. None of the troublesome problems of wrongdoing are

⁵² The court in *City of Milwaukee v. Industrial Commission* (Wis.) 151 N. W. 247 (1915), makes the point clear:

"It is argued that there can be no proximate causation without the element of reasonable anticipation of the same or some result similar to that which actually follows. It is a sufficient answer to this argument to say that the right to recover under the Workmen's Compensation Act is not dependent upon a question of negligence or upon the concomitant conceptions of negligence under the common law. Proximate cause, as applied to negligence law, has, by definition, included within it the element of reasonable anticipation. Such element is a characteristic of negligence, not of *physical causation*. * * * But when, as under the Compensation Act, no act of negligence is required in order to recover, the element of negligence, namely, reasonable anticipation, must be eliminated therefrom, and the phrase, 'where the injury is proximately caused by accident' used in the statute must be held to mean caused in a physical sense, by a chain of causation which both as to time, place, and effect is so closely related to the accident that the injury can be said to be proximately caused thereby. To incorporate into the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the Legislature industriously put out at another." * * * See *Brody v. Oregon Lumber Co.* (Or. 1926) 243 P. 96.

See generally: Honnold on Workmen's Compensation, vol. 1, p. 476 et seq.; Knowles: Law Relating to Workmen's Compensation (4th Ed.) p. 16 et seq.

present to prevent ready discernment of the cause problem as are present in unintended or negligent wrongs. Intention, malice, motive and the like are more easily handled by judge as well as jury than all those numerous factors necessary to be considered in negligence cases. The differences in the two classes of cases all result from the comparative difficulties in dealing with these other elements involved.

It is usually said that a person is liable for all those consequences which he intended, however improbable, but not so for unintended consequences if improbable. Neither branch of the statement is correct. One is not responsible for consequences which he intended unless he contributed appreciably to cause them, as has already been shown. On the other hand, one may be responsible for all the consequences of his act even though he did not intend them, and even though they were improbable. If it is said that one who intends harm to another's legally protected interest is always responsible for such harm as he contributes to cause, this would be correct, provided the interest is protected by the rule invoked against the risk incurred. Likewise, it may be said that one who otherwise wrongfully invades another's legally protected interest is responsible for all the consequences resulting thereto from that invasion whether such results were probable or improbable, provided the interest was protected by the rule invoked against the risk incurred.

An illustration or so will suffice. If D, desiring to kill P who is passing in a plane, shoots at P with an ordinary fowling piece and actually kills P or cripples his plane so

that P is killed by the fall, the fact that such a result was wholly improbable, a most remote possibility, would not relieve D of responsibility. The same liability would be imposed if D merely intended to frighten P,⁵³ or merely to cripple his plane. In the last case, the intent to do harm to a property interest would also be an assault since P's person is so vitally dependent upon it. So if D, desiring to see P beaten up, should tell X a tale for the purpose of infuriating X so that he would beat up P, the responsibility would be the same as though D himself beat up P, even though P should die from the effects of the beating.⁵⁴

But, suppose in the first case that D were shooting at a bird, but the shot killed P or brought down his plane, the cause of P's death would be exactly the same, but D's responsibility would depend upon different considerations. If D were held not responsible, it would be either because such a risk was not within the rule invoked, which would be a matter for the court, or if within the rule, because there was no probability in the particular case of D's invading P's interest; that is, causing his bodily hurt—no negligence. This would be a question for the jury, unless it were so clear that there could be only one reasonable inference drawn from the evidence, in which event the court would direct a verdict.

In the second case, if D had no intention that X should beat up P, under the decisions, there would perhaps be no liability at all. This would be so because of the so-called doctrine that X would be an independent, intervening, hu-

⁵³ *Wilkinson v. Downton* (L. R. 1897) 2 Q. B. 57.

⁵⁴ *Quinn v. Leathen* [1901] A. C. 495, 537.

man agency.⁵⁵ But the lack of responsibility would not be for lack of cause. On the contrary, there would be as much causal connection in the one case as in the other. But the court would probably decide, though not articulately, that such a risk as this does not fall within the scope of the rule which prohibits one person from telling a tale on another. The court would probably say the damage was too remote, which sounds like a lack of causation, but which is in fact a refusal to extend the rule invoked to protect the interest which has been injured against this sort of risk. It would seem in reason that the court might say that such interest is within the protection of the rule and then leave the jury to say whether D should have anticipated that his lie would infuriate X so that he would beat up P and, if the jury so found, to hold D responsible.

The point is that causal connection is no different in the two types of cases. But, liability is imposed in one because the wrongdoer was a wilful one, while it is denied in the other, because the other elements cannot be made out. In the latter instance, either because no protection is given against the risk under the rule invoked, or because there was no probability of harm—no negligence. The difference in results, therefore, is not because of a difference in causal relation, but because of the difference in the constituents which make up the other elements in intentional wrongs and in negligent wrongs. The analysis holds good generally.

The doctrine of "constructive intent" in intentional

⁵⁵ *Vicars v. Wilcox*, 8 East, 1 (1806).

wrongs is sometimes confused with the causal connection problem. A shoots at B with intent to kill him, but kills X instead. A is held liable for X's death in a criminal action for murder as well as in a civil action for damages on account of wrongful death. Clearly this is not a cause problem. The question in the criminal case is this: Is the risk of killing X, in making an assault on B, within the scope of the rule which the prosecution invokes to vindicate the public's interest in the life of X? Is such a hazard protected against by the rule invoked? The courts say that it is, but on the theory of transferred or constructive intent. A good result is reached by means of a fiction. The basis of this holding, however, is a much broader one than the defendant's intent; society's interests are not dependent upon any such narrow consideration.

But suppose that the attempt A made to kill B is made under such circumstances that it is altogether improbable that X or any one else will be endangered? But X is killed. Does this make any difference? If it does, it is not because there is any lack of causal connection. The difference will come in the court's determination of a sound policy to be pursued in the respective cases. The surveying of the limits of liability in this case encounters the same sort of problem as in determining whether A should be liable if he were exercising the right of self-defense in shooting at B, although it were highly probable that X, an innocent party, might be killed. The improbability or probability, as the case may be, will not be decisive in either case. It will merely be one factor to be

taken into account in bounding the scope of the respective rules.

If, in the first case assumed, X's widow were suing A for X's wrongful death, identically the same problem would be involved as in a criminal action. Was the risk of harm to X involved in A's assault upon B covered by the rule invoked, i. e., the rule prohibiting A's killing of X? If it were altogether improbable that X's interest in his bodily safety would be put in peril by such assault, this would doubtless be one of the factors to be considered in determining the limits of the rule, but by no means the only factor. If A were acting in self-defense, the high probability that X would be injured by A's exercise of this privilege would not make him liable any more than the lack of such probability would prevent his being liable in the first case. The *probability* factor here is merely one among many, and the case resting as it does on the *intent* of A as one of the constituents of the several elements in this class of wrongs, its weight will not be the same in determining the rule which the court thinks is in accord with the best policy, as it would in those crimes and civil wrongs which are based on the *negligence* concept. But, in both types of cases, the troublesome problems are those which arise in determining those other elements rather than in causal connection.

SECTION 4

OTHER THEORIES OF CAUSATION

Many theories for determining causal relation have been advanced. Most of them have been so complex that they have broken under their own weight without having been subjected to any test of trial and error. Only two have received any general recognition.

A.—THE PROBABLE CONSEQUENCE THEORY

The theory which has received the widest recognition by courts is the "probable consequence" formula. It has been stated in numberless variations. Under its application, a defendant is held only for those consequences which are "natural and probable," or which can be reasonably foreseen or anticipated as probable. This is merely the "probability of harm" test of negligence couched in terms of causation. "In other words, the test of remoteness of damage is treated as identical with the test of negligence. The foresight of a reasonable man is used as a test to determine not merely whether the defendant had been guilty of negligence but also the extent of his liability for the consequence of such negligence."⁵⁶ Under this formula the specific consequences do not have to be foreseen, but only probable injury to the plaintiff or some one so situated. Moreover, the foresight is that of the ordinarily prudent person under the same or similar circumstances as those under which defendant acted. Few courts have apparently observed the complete emptiness of this rule

⁵⁶ Salmond: *The Law of Torts* (6th Ed.) p. 138.

as a determinant of causation. For how is a consequence to be considered as a result of a wrong, until it is known what that consequence is? When that is known, the inquiry is ended and no test is needed. What the courts actually do when they do not require the exact consequence to be foreseen, and substitute a general foreseeability of harm test, is to abandon the test altogether as a test of causal relation. In other words, the courts employ the "probability of harm" formula for use as a test of negligence, which is correct, and then by way of a gesture attempt to apply the same test as a basis for determining causal relation. This in effect reaches the same result as if *no* test of causation were required, as if the cause issue had fallen out altogether. This works the only virtue of the rule, for in the overwhelming majority of cases causal connection is not an issue. Hence, the attempted employment of this test as a cause determinant is both fatuous and harmless. It leaves both judge and jury free to use their common sense in the solution of the cause problem and this is desirable. It is only in the hard cases that it works to a disadvantage and there it is either abandoned,⁵⁷ or works a disastrous result. It may be pointedly observed here that use of such a test is rarely made except in negligence cases. This should throw doubt, if more is re-

⁵⁷ A recent Wisconsin case illustrates how the test is sometimes amended in a commendable and rational way: "Further there must be a reasonably clear, physical, causal connection between the negligence and the injury claimed as the result thereof, so that it can be seen that, but for the negligence, the injury would probably have not resulted." *Fox v. Koehring* (Wis. 1926) 209 N. W. 708, 711.

quired, upon its availability as a general test of causation, since the causal relation issue is the same in all classes of cases. The only way in which its general vogue can be explained is that it is a simple concept, easily phrased in terms of a formula made familiar by constant employment as a negligence test, *means nothing in causation*, and therefore, offers no obstacle if it must be departed from in order to get a desired result in a particular case.⁵⁸

Dean Wigmore has no doubt made the most rational use of this so-called test of causation. But his analysis is built on a concept of "culpable causation" which at heart embodies nothing more than the wrongdoer element of legal liability. In short, the element of causation is lost sight of and drops completely from view in the combination of it with the vastly more important element of culpability.⁵⁹ His analysis leaves causation no place as a distinct element in legal liability, but makes it, if anything, a mere qualifying factor to be considered in determining wrongdoing. No attempt is made to subject it to control as such factor beyond the requirement imposed by the *sine qua non* isolating test. The principal advantage of this method of dealing with the cause element lies in this very fact. The sham of considering it as an independent element is done away with and thereby the overemphasis ordinarily given the problem is eliminated. Its importance, save as one of

⁵⁸ See Jeremiah Smith: *Legal Cause in Action of Tort*, 25 Harv. Law Rev. 103, 223, 303, *Selected Essays on Torts*, 649, 660; Bohlen, 40 Am. Law Reg. 485; Green, 1 Tex. Law Rev. 243, 423; Bingham, 9 Col. Law Rev. 139.

⁵⁹ See 2 Wigmore: *Select Cases on Tort*, pp. 865-870.

the factors in the determination of the wrong element, approaches zero and, unless its true place is to be recognized and given rational consideration, it should be ignored in some such fashion as giving rise to an independent problem. No doubt this process represents what a majority of the courts actually do in dealing with the problem in negligence cases, though their opinions purport to treat the problem as an independent one of much importance. It works well enough in the pattern cases and also in new cases which present no great difficulty, but it works havoc in hard cases and especially in the hands of judges who take the formula seriously and who allow it to cloud all the important problems of legal liability. It refuses to work just when assistance is needed.

B.—THE NATURAL CONSEQUENCE—SUBSTANTIAL FACTOR RULE

As opposed to the Probable Consequence Rule there has grown up a body of respectable authority in support of the doctrine that once a defendant has been found to be a wrongdoer, he is responsible for all the consequences which “naturally” result from his wrong. The term “natural” is here used in the sense of cause and effect.⁶⁰

⁶⁰ Jeremiah Smith: *Legal Cause in Actions of Tort*, 25 Harv. Law Rev. 103, 223, 303, *Selected Essays on The Law of Torts*, 711; 1 Street, *Foundations of Legal Liability*, 111 et seq.; Salmond: *The Law of Torts* (6th Ed.) pp. 140, 150; Bohlen: *The Probable or Natural Consequences as the Test of Liability in Negligence*, 49 U. of Pa. Law Rev. 79, *Studies in the Law of Torts*, 1; *In re Polemis v. Furness, Withy & Co.* [1921] 3 K. B. 560; *Smith v. London & S. W. Ry. Co.* (1871) L. R. 6 C. P. 14; *Anderson v. M. St. P.*

Under this theory as originally conceived, practically the only limitation placed upon liability as dependent upon

Ry. Co., 146 Minn. 130, 179 N. W. 45 (1920); *Tullgren v. Amoskeag Mfg. Co.* (N. H.) 133 A. 4; *Fraser v. Flanders*, 248 Mass. 142, 142 N. E. 836 (1924); *Shafer v. Keeley Ice Cream Co.* (Utah, 1925) 234 P. 300, 38 A. L. R. 1523. In *Derosier v. New England Tel. & Tel. Co.* (N. H. 1925) 130 A. 145, Snow, J., said:

“Upon the question whether the defendant has been guilty of negligence, the rule of reasonable anticipation applies. *Minot v. Railroad*, 73 N. H. 317, 321 (61 A. 509), and cases cited. But when his fault has been established, the rule has no application upon the issue of damages. *Bowley v. Duca*, 80 N. H. 548, 552, 120 A. 74, 76; *Tuttle v. Dodge*, 80 N. H. 304, 311, 116 A. 627.

“Because the issue as to anticipation is one of reasonableness, the error has sometimes been made of assuming that reason for the defendant to anticipate the precise damages suffered is the test. The law is otherwise here.

“A closer question is whether reason to anticipate the infliction of some damage in this particular way is decisive of liability. In a rather general sense it may be said to be so. * * * Anticipation of the exact way in which its wrong is to become operative and cause injury is not required. * * * Anticipation of how the defendant's wrong was to be added to and made efficient is no more essential here than it was in the earlier cases.

“There was sufficient evidence that the defendant was in fault. Whether that fault caused the injury is a different question to which other considerations apply. No legal question has been more discussed in the cases than this one of legal cause, or, as it has commonly been termed, proximate cause. Very many attempts have been made to frame a definition or state a test which will determine whether there is or is not liability in all cases. None of these attempts have been successful. Their failure results necessarily from the nature of the problem. The question is essentially one of fact, and is so treated in this jurisdiction. *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1, 3, 51 A. 281; *Prichard v. Boscowen*, 78 N. H. 131, 97 A. 563; *Robertson v. Monroe*, 80 N. H. 258, 262, 116

the cause element was the *sine qua non* qualification; that is, a defendant's wrongful conduct must have been a cause

A. 92. Whether there is any evidence upon which a conclusion one way or the other could be based is matter of law. *Searle v. Parke*, 68 N. H. 311, 312, 34 A. 744; *Gage v. Railroad*, 77 N. H. 289, 295, 90 A. 855, L. R. A. 1915A, 363; *Morier v. Hines*, 81 N. H. 48, 54, 122 A. 330. It happens that in many cases the result is so immediate that the evidence does not admit of any other conclusion than responsibility; and in other cases the causation is so inconsiderable and so far removed that it is entirely clear that the law of responsibility, as at present understood and administered, cannot lay hold of it as ground for legal action. But the bulk of the litigated cases lies between these boundaries. They each present a fair question of fact, to be decided upon the circumstances of the particular case.

"Upon each issue, fault and causation, there may be a question of the logical relation of events. As to duty, this looks to the future; it is a matter of probability. Precaution being a duty only so far as there is reason to apprehend results, the question of the reasonable and natural sequence of events becomes material and controlling in the inquiry as to what legal duty requires one to do or refrain from doing. The issue being of duty to anticipate, likelihood or unlikelihood of a future happening is the turning point. We are not here dealing with the question of causation, but of duty. The viewpoint is from the present towards the future.

"But upon the second question—whether a breach of duty caused recoverable damage—the inquiry concerns events that have become facts. This result has happened. The issue of probability is not here a controlling one, the inquiry being for the efficient cause. *Jeremiah Smith* in 25 Harv. Law Rev. 103, 223, 303. The argument advanced in this case is that the defendant was not bound to anticipate the fault of the traction company; that the ensuing result was not foreseeable, and, therefore, was not in law caused by the defendant's fault. There are cases where the decision supports this conclusion, and many more containing language to the same effect. The error has arisen largely from a failure to dis-

“but for which” the injury would not have happened. Jeremiah Smith substituted as more intelligible and less

tinguish between breach of duty and causal connection. As to the former, probability of injury is essential; as to the latter, it is not.

“It would seem to be axiomatic that the direct and immediate results of setting force in motion are proximately caused by such act. But because foreseeable results are in general held to be proximate, the error has been made of assuming that those not foreseeable are never proximate. And because a want of care cannot be predicated upon a failure to anticipate and provide against an unforeseeable event, it has been assumed that want of care cannot be the proximate cause of such an event. Neither conclusion is sound law. The foreseeable quality of an event following a breach of duty is always material upon the issue of accountability for the act. Upon the question of causation, this quality is material only as it operates through the moral aspect of the case, which not infrequently has directed the course of the law. He should have foreseen; therefore, he is morally guilty. Causation, as distinguished from duty, is purely a matter of producing a subsequent event. In determining how far the law will trace causation and afford a remedy, the facts as to the defendant’s intent, his imputable knowledge, or his justifiable ignorance are often taken into account. The moral element is here the factor that has turned close cases one way or the other. For an intended injury the law is astute to discover even very remote causation. For one which the defendant merely ought to have anticipated it has often stopped at an earlier stage of the investigation of causal connection. And as to those where there was neither knowledge nor duty to foresee, it has usually limited accountability to direct and immediate results.

“This is not because the defendant’s act was a more immediate cause in one case than in the others, but because it has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault were present. Treating all these cases as turning upon an issue of immediateness of causation has resulted in much confusion of ideas and made the conflict of decisions appear to be greater than it is. Most of the

subject to confusion, the qualification that a wrongful act must have been a "substantial factor" in producing the result. In other words, liability is incurred for all the consequences which follow the violation of a rule protecting the injured interest in question so long as such violation is a substantial factor in producing them.⁶¹ He phrases the problem this wise:

"Problem—What constitutes such a relation of cause and effect (such a causal relation) between defendant's tort and plaintiff's damage as is sufficient to maintain an action of tort?

"General Rule—Defendant's tort must have been a substantial factor in producing the damage complained of."⁶²

It is believed that so far as any aid can be given judge or jury for assisting in the solution of this simple inquiry,

cases wherein inability to foresee has been held to be an answer to the plaintiff's claim of causation are those where the result was not immediate, but depended largely upon extrinsic and intervening causes. The result was somewhat remote, and a morally innocent party ought not to be held liable, though one morally guilty should be. The decisions do not turn on remoteness of causation alone, but upon such remoteness plus freedom from moral fault."

This statement is very clear and is wholly acceptable except that near the end the problem of causal connection is confused with that of defining the scope of the rule which protects the injured interest. The court allows the factors of morality and justness, to influence the determination of causal relation when they are only properly factors in determining the limits of protection afforded the injured interest. Perhaps this is not a just criticism if the court's language is read very carefully.

⁶¹ *Anderson v. M., St. P. & S. S. M. Ry. Co.* (1920) 146 Minn. 430, 179 N. W. 45.

⁶² *Selected Essays on Torts*, 711.

nothing can be added by way of legal rules without materially subtracting from its force. Nor can much be added by way of explanation of the term "substantial factor" without blurring its pointed simplicity. Perhaps the term "appreciable" is as near a synonym as can be suggested. It must be left to the jury or other fact-finding agency, as the case may be, to answer the inquiry as best they can in the light of all the factors operative in the particular transaction. It is believed, moreover, that when the cause issue is pared down to its legitimate scope in any case that this inquiry is all that is desirable or necessary. As has been repeatedly pointed out the inquiry seldom arises, for in most cases causal connection, or the lack of it, is so clear that there is really no issue for a jury. But if the courts must submit the question as has been the practice, the formula suggested at least indicates to the jury an intelligible basis for giving an answer.

CHAPTER 6

THE PROBLEM OF DAMAGES

It will only be necessary to consider the damage problem in so far as it may bear upon the other problems of legal liability already discussed. The purpose is merely to indicate the difficulties which arise in assessing damages in order that it may clearly appear that they have nothing in common with those arising under the elements already discussed although the problems are not infrequently confused.

Assuming a plaintiff's protected interest to have been injured by defendant's wrongful conduct, what compensation will be awarded? Clearly, the first step is the making of an inventory of the losses which flow from the injury; the second, to give them a money valuation. Both judge and jury have functions to perform in dealing with each step.

The making of an inventory of the losses suffered as a result of the injury to plaintiff's interest is not a difficult process. If the court has in mind the rule invoked by the plaintiff and the hazards protected against, all those losses which fall without the scope of the rule's protection will be of necessity excluded from any inventory of losses which the jury is directed to find. An example or so will suffice.

P sues D for personal injury negligently inflicted, D having negligently run into P's car at a crossing. The following items may be inventoried as illustrative of the

items of loss actually produced by defendant's wrongful conduct:

(1) Structural impairment of the body; a broken leg, a disfigured face, a fractured skull.

(2) Physical pain and anguish.

(3) Repair bills, such as medicines, the services of surgeon, nurse, and hospital.

(4) Loss of time, if the condition is temporary; diminished earning capacity if permanent.

(5) Loss of companionship with old associates and social pleasures once enjoyed.

(6) A broken marriage engagement with X, a beautiful, accomplished and wealthy girl.

(7) Inability to close a certain contract from which a large commission would have been received.

(8) Inability to take a European trip for which plans were all perfected at the time of the injury.

Which of these items will the court permit the jury to include in its findings or inventory of losses? Clearly, it is the court's function to direct the jury as to what items they may consider and the jury's function to determine which of such items were actually suffered. How does the court solve its problem? It is clear that this problem might conceivably arise either on the pleadings, if plaintiff pleaded his losses by items, or by objections to the evidence, or by instructions to the jury.

The determination of the problem is the same as that of defining the scope of the protection afforded by the rule invoked for the protection of the injured interest. All the items for which recovery would not be allowed

would, therefore, have already been excluded in determining the primary problem of the protection given the interest. If the problem has been met at a prior stage of the case there is nothing further to be done at this stage other than adhere to the prior ruling. Thus, in the performance of this primary function in the supposed case, items (5), (6), (7), and (8), as listed above, would have already been eliminated because they do not represent interests which the rule invoked is designed to protect. Plaintiff is not protected against such losses as these by the rule, for instance, which requires the defendant to exercise reasonable care in driving his vehicle on a public street. The factors involved in the consideration of such a problem have already been discussed in the preceding pages. It is true that such interest may be protected by some other rule, but not the one here invoked. For instance, if defendant intentionally beat plaintiff for the purpose of causing his marriage engagement to be broken, his trip prevented, or his ability to close a certain contract to be destroyed, then the plaintiff might well be afforded protection as to these interests.

On the other hand, (1), (2), (3), and (4) clearly constitute items which the court would direct the jury to consider if the facts proved supported them. They represent interests which the rule invoked is designed to protect as has been accepted in numerous cases. It may be that item (4) does not represent an interest which the rule is designed to protect, but that it is used normally merely as a basis for calculating the monetary value of item (1) as later to be explained. In this connection it may be again

observed that the interests which courts will give protection under the rules most generally invoked are rather highly standardized. Precedents are numerous, so much so that most losses are held to fall either within or without a particular rule, as the case may be, with marked precision.

Defendant's automobile negligently collided with plaintiff's automobile, causing it to be smashed and a suitcase in the car to be thrown in a gutter filled with water. What is the loss flowing from this wrongful invasion of P's property interest? It is a matter of inventorying the items. Whatever they may be, from the parts of the wrecked car to the minutest article of personal apparel in the suitcase, so long as they are items of property which have been damaged, they belong on the list. But suppose the wreck causes P to miss his ship, or a friend's wedding, or the car was a gift from a dear friend, hence possessing a sentimental value? Would these losses be counted in, although as much a result of the wrong as the destroyed or damaged property items? Under our analysis, the rule invoked offers no protection to these interests; under the usual treatment given by the courts, they would be considered too "remote." In either instance, they are eliminated as items for which recovery can be had by the court's defining the protection given by the rule which plaintiff relies on to vindicate his injured interest.

Defendant contracts to deliver P a car on a certain date. The contract is breached by D's refusal to deliver. What is the damage recoverable? Assume plaintiff had

prepared to take a cross-country trip in this car; that he expected to use it for family purposes; or that he had made a resale of it. What will be recognized as the interest protected and the loss for which he will be compensated? The court must define the scope of the agreement, and thereby determine the risk for which recovery would be allowed, by an application of the "contemplation of the parties" formula. The injury done to the particular interest which was found to have been in the contemplation of the parties will furnish the basis for making an inventory of the losses.

It must be apparent that the process here indicated is the same one considered at length in the early pages of this book. It is not a damage problem, except that its solution necessarily eliminates from further consideration many losses which the plaintiff may have suffered.

The true damage problem begins where the process just indicated leaves off. The scope of the protection allowed plaintiff being defined, what items of loss within this protection have been suffered? These and these only are to be listed. Here it must be clear that the first step in this process is one of canvassing the proof and listing the items. It is at this point that the rule of "certainty" plays its part. The evidentiary data must be such that the jury is warranted in finding that any particular item of loss has been incurred. How much proof must be made before the jury will be allowed to consider any particular item is a problem falling within the province of the court, but offers no difficulty here not found in other cases where a finding of fact is required. The burden on the

plaintiff is to adduce enough data so that the jury may reasonably find that he has suffered the loss alleged. The process is well recognized and requires no further consideration.

The second step and the most distinctive one involved in the damage problem is the evaluation of the losses so inventoried by the jury in terms of money. A recovery of damages is in terms of dollars and cents. It is, therefore, necessary in every case that there be some standard furnished the jury for measuring the value of the items of loss. The court must also superintend this process and frequently it is a troublesome one. There are numerous damage yardsticks. The court is committed to the general doctrine of giving that measure which more nearly affords compensation to the plaintiff. In one case the standard of measurement is one thing; in another a different one. In a suit for money itself, as on a note or the conversion of specie, the measure is certain as to the principal sum and for the use of it the rate of interest furnishes a standard. The interest rate, whether as contracted for by the parties or the legal rate, is thus the most definite standard which can be furnished a jury.

In a case involving the conversion of personal property which has a salable value in the market, this market value is taken as a measure by which to determine the value of the loss. This is another of the law's most definite standards.

In a case of the interference with a business or the performance of a contract, the profits which plaintiff would have made may be taken as a standard. Here it is ap-

parent that plaintiff must not only show an interference but must show enough other data to indicate what the profits would have been. As in the case of interest, except it be the legal rate prescribed, and in the case of market value, the plaintiff must here, also, go far enough with his proof to establish a standard which will justify the court in authorizing the jury to accept it as a basis of measurement of the loss.

In the case of injury to property, real or personal, it may be possible, if the injuries are permanent, to measure the loss by the difference in market value before and after injury, in which event the plaintiff, after showing the extent of his injury, must go still further and make proof of two standards in order to give a value to his loss. But if the injury is a temporary one, the value of the use of the property for such period of its injury may be adopted as a more just standard of measurement.

In cases of injury to the person resulting in death, permanent injuries not fatal, or merely temporary disabilities, the difficulties of finding a proper standard, and of the plaintiff's furnishing it, may be very great. It may be possible in temporary disabilities to calculate part of the loss by determining the value of plaintiff's services during the time lost. In cases of permanent disability, by the loss in earning power. In cases of death, by ascertaining the probable expectancy together with the probable earning power per year and by calculation ascertaining what the gross earning power would be. But in all these instances the standard is ordinarily a very indefinite one, and the jury has the greatest latitude in applying it.

Moreover, the other items of such injuries, such as the pain and anguish and the impairment of the bodily structure, are incapable of measurement by any standard which the court can give the jury and must be left at large to their good sense.

These illustrations are merely for the purpose of directing attention to the distinctive problem involved in dealing with the damage element and not as a summary of the various means for determining the problem. The possible measurements are myriad, and each type of case necessarily demands a distinct rule, and the differences in cases of the same type frequently call for a multitude of limitations and refinements. The courts normally adopt the standard best calculated to give compensation in the particular case. While mistakes may be made in choosing the proper standard in a given case, the process is easily understood and generally recognized.

It must be apparent that neither step required to be taken in dealing with this problem has anything in common with the process of determining causal relation. The steps which are taken in all prior stages of a case may affect the extent of the recovery very greatly but they do not involve the damage problem in its correct sense. They are only pertinent to other problems which must be solved in every case before the question of damages is reached.

It may be well to observe that those other problems indicated by the terms "liquidated," "nominal," and "exemplary" damages, are in no wise related to the true damage problem. Liquidated damages is merely a problem in the

interpretation of contracts; nominal damages, a means of vindicating certain rights where the damage resulting from the injury is not appreciable; and exemplary damages a means for punishing the wrongdoer for his meanness aside from the loss he has caused. Perhaps, the last is also sometimes employed as a sort of compensation for losses which either cannot be measured at all, or against which the law normally does not give protection. But none of them are important in distinguishing the several large problems involved in the process for working out legal liability.

GREEN PROX.CAUSE

CHAPTER 7

CONCLUSION

A mine operator left a small quantity of nitroglycerin (about a pint) in an open container at the mouth of his mine. A passing pup drank it and ran to overtake its master. In jumping out of the way of a bus on the highway, the dog slipped on the ice and received a rather severe jolt. The jolt set off the nitroglycerin. The pup, bus, driver, passengers and highway were blown to bits.¹ The owner of the dog, the owner of the bus, the legal representatives of the driver and of the passengers, and the county, all bring suits against the mine operator to recover their respective damages.

Under the method of attack which we have sought to describe three elements of each case are very clear: (1) An interest under legal protection, (2) causal connection, and (3) damage. The two other elements are not so clear. The violation of the rule which requires the handling of dangerous explosives with the utmost care for those interests within their range, i. e., negligence, might or might not prove difficult.² We shall assume that there is room for a difference of opinion and that a jury would find the operator negligent. *But was this sort of hazard*

¹ See Time, p. 22, December 20 (1926) for the fact basis in part of this assumed case.

² Suppose that the operator in the spirit of play had induced the pup to drink the explosive, with the same results?

protected against by the rule which the operator violated?
This is the decisive problem of the lot.

No doubt the process as now employed by courts would ostensibly revolve around a consideration of the probability or foreseeability of such a happening. This is the merest self-illusionment. In this case such a factor, while worthy of some consideration, would necessarily be of slight moment for, so far as known, there have been no similar happenings. There is no experience to use as a basis of foresight. Under the analysis which we have suggested it is clear that a court passing on this point should have to consider many factors. The ultimate inquiry as we should require is, Where *should* the law place the risk? Who *ought* to be made to bear it? We say "ought" and "should" because we shall only know where the law has placed it and who shall have to bear it after the law has spoken. Shall the innocent dog owner, bus owner, driver and passengers, or their dependents, and the taxpayers of the county bear the losses; or shall the mine owner whose business and profits call for the use of such explosives? This is the problem to be decided; not whether there was "proximate cause" or some other equally vague conception.

Is it placing too heavy a burden on the dog owner, the bus owner, the dependents of driver and passengers, and taxpayers to allow the risk to remain where it fell? What is a workable solution in such cases? Are persons to be insured against all losses produced by every infraction of a rule designed to protect the interests of others? Can the law afford to recognize that a person

who violates one of its rules shall not be required to answer for the injury done, however great it may be? Here are both property and lives destroyed by the inadvertence of another. Family relations have been destroyed, children and mothers rendered without support by the heedless act of one engaged in business for profits. Must he pay? But it must be remembered that while this operator was engaged in making profits for himself, he was also rendering a valuable service to society and if too great responsibility be put upon mine operators they will be discouraged from rendering this service. That will mean fewer and higher priced mined products for the consumers, and they may be myriad, less valuable land and royalties to those who own mining lands, less demand for labor. Such activity is a good thing and should be encouraged, but not at too great cost. Is it too much to make the operator respond for these losses leaving it to him, if he can, to shift the burden to the consumers of his products, and they to the consumers of their products, ad infinitum? But why should these innocent parties be called to pay?

Would the problem be any less difficult in the case of the dog owner against the operator than in the case of the driver's widow and children against the operator? A dog is not so valuable as a human life. But neither will the cost of compensation be so great. If protection should be extended to one interest against this hazard does this mean that the same protection must be extended to all the other interests? How far afield may such inquiries be pursued? If begun at all where shall they be stopped?

Is it better after all that they be cut off and that consideration be restricted within the boundaries of an impertinent if not a meaningless formula?

Despite the intricacies involved, despite our incapacity to deal appreciatingly with all the conflicting interests even in the easiest case, can we rationally escape the attempt? The fact remains that whatever judgment is passed some interest is favored and some other disfavored. The risk is made to fall one way or the other as certainly as judgment is rendered. But shutting our eyes, stopping our ears, resorting to doubtful formulas or other device of chance, does not mean that judgment is escaped nor that it is an intelligent and acceptable judgment. It merely means that we have been saved the painful process of rational judging. But as much as we have rested on formulas, do we really insist that they render this service with precision, or do we merely use them to bear the weight of judgment arrived at by processes which we ourselves do not understand nor attempt to vocalize?

Does not the problem shake down to one of weighing the interests involved and apportioning the risks according to the dictates of that "will-of-the-wisp" justice we think so much of? If so, is not the whole question what machinery shall we use to do this weighing and apportioning? If we make use of legal rules, who shall define them? *

Shall we risk the judges, whom we like to think able to comprehend the purposes of rules and to take into account the interests of a whole society, to define the scope of protection afforded? Or shall we leave such functions

(in addition to the important process of fact finding) to the whimsical incapacities of laymen, never more unreliable than when called upon to define the boundaries of law?

Shall we recognize the problem as something of importance, requiring the best powers of the law-fashioning function? Or, despairing of rational adjustment of such complex and multitudinous factors, shall we continue to hope for a solution in terms of superficial formulas and magical phrases?³

This is what our problem comes to.

The method of analysis developed in the foregoing pages does not purport to make the deciding of cases automatic or even easy. Its only purpose is to make the process rational—understandable—to strip it of hocus-pocus—to free our legal thought from the slavery of mocking phrases which defy analysis because they are empty. To know our problem is half the battle. To locate the points of weakness in a case is a step just short of its solution.

³ No doubt in times past this process of juristic magic has served a real purpose as a sort of smoke screen for judicial action which was best kept hidden from the litigant and voter. But must our judges continue to debase their intelligence by stoutly proclaiming their innocence of law "making"? It would seem that our democracy is now strong enough to know the truth about the nature of the judicial process and be the better for its knowledge. Likewise, our jurisprudence is ready to receive the touch of the judge who is conscious of the high responsibility of his craft without its being the worse, and without his being chilled by the understanding of those who are subject to his judgment.

The analysis does these principal things:

1. It unloads the term "cause" of its numerous meanings, leaving it to connote merely the relation between cause and effect—physical causal relation. This is one distinct element of legal liability all by itself, though a minor one.

2. It adds a new step—the determination of the limits of protection afforded by the rule invoked by a litigant to vindicate his interest. It makes this the function of the judge. It requires him to say whether the risk encountered is one which the rule was designed to protect against. This requires the broadest survey of policies. It restrains the judge from shifting this most important problem to a jury as has been done time and time again under the farcical term "proximate cause." It restricts the jury to the province of fact finding but insists that the judge give the proper respect due such high function by not invading that province himself. It requires the judicial function to operate scientifically by consciously fashioning the law in view of the numerous factors involved, instead of resting the fashioning of law on a game of chance with a single factor always the "trump." It brings to the surface the problem which has heretofore lain hidden under the mysticism of a mere word. It affords the isolation, the emphasis, the magnifying lens, which are needed in intelligently drawing the boundary line of the law's protection, the farthest reach of the law's rules. It requires the experts charged with the administration of the judicial function of government to exercise their function and

to do so openly and consciously. These are the primary accomplishments of the process.

There are a number of incidental ones which follow in the trail of the principal accomplishments:

1. The determination of wrongdoing, i. e., the violation of the rule involved, becomes a secondary problem—one ordinarily for the jury's verdict, assuming an issue has been made by the evidence.

2. The issue of causal relation is seen also to be secondary—a pure fact inquiry, if there is any evidence raising the issue.

3. The damage problem, likewise, assumes its proper place as one of merely inventorying the losses—an inquiry of fact under the supervision of the court as to what items are to be considered and the standards of evaluation to be employed.

4. And more than any of these, the process accentuates the fact that there are numerous decisive stages in the development of a case—many places where it may be decisively disposed of:

- a. Plaintiff may have no right to be vindicated.
- b. An inappropriate rule may have been invoked.
- c. The hazard encountered may be one against which the rule gives no protection.
- d. A lack of evidence as to a violation of the rule (wrongdoing) may require an instructed verdict.
- e. A lack of evidence as to causal relation may require an instructed verdict.

- f. A lack of evidence as to damage suffered may require an instructed verdict.
- g. The jury may find no violation of the rule, i. e., no wrongdoing.
- h. The jury may find no causal relation.
- i. The jury may find no damages.

The cases indicate that courts in the rush of their business are constantly deciding cases at one stage when the decision should have come at another; making one point decisive when some other was the turning point. No doubt the very vagueness of the methods which have been employed to determine causal connection has proved alluring to courts. The process here suggested is calculated to make it easier to avoid this sort of error, to make the decisive points of a case more readily discoverable, to indicate to both court and litigant what is being done, and to aid in developing a rational process of legal analysis as a means of deciding cases.

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